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12

OHIO CIRCUIT AND APPELLATE COURT REPORTS

NEW SERIES. VOLUME XX.

CASES ADJUDGED
IN
THE CIRCUIT COURTS AND COURTS
OF APPEAL OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1915.

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JUDGES OF THE CIRCUIT (NOW APPELLATE) COURTS OF OHIO.

HON. H. L. FERNEDING, *Chief Justice*, Dayton.

HON. PHILLIP M. CROW, *Secretary*, Kenton.

FIRST CIRCUIT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

PETER F. SWING	Cincinnati
EDWARD H. JONES	Hamilton
OLIVER B. JONES	Cincinnati

SECOND CIRCUIT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

JAMES I. ALLREAD	Greenville
H. L. FERNEDING	Dayton
ALBERT H. KUNKLE	Springfield

THIRD CIRCUIT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

TIMOTHY T. ANSBERRY	Defiance
W. H. KINDER	Findlay
PHILLIP M. CROW	Kenton

FOURTH CIRCUIT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

THOMAS A. JONES	Jackson
FESTUS WALTERS	Circleville
EDWIN D. SAYRE	Athens

FIFTH CIRCUIT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

RICHARD M. VOORHEES	Coshocton
L. K. POWELL	Mt. Gilead
R. S. SHIELDS	Canton

SIXTH CIRCUIT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

REYNOLDS R. KINKADE	Toledo
S. S. RICHARDS	Clyde
CHARLES E. CHITTENDEN	Toledo

SEVENTH CIRCUIT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey
Harrison, Jefferson, Lake, Mahoning, Monroe,
Voble, Portage and Trumbull.*

WILLIS S. METCALFE	Chardon
JOHN POLLOCK	St. Clairsville
W. H. SPENCE	Lisbon

EIGHTH CIRCUIT.

Counties—Cuyahoga, Lorain, Medina and Summit.

LOUIS H. WINCH	Cleveland
WALTER D. MEALS	Cleveland
CHARLES R. GRANT	Akron

TABLE OF CASES.

A. & C. J. Ry. v. S., N. & M. Electric Ry.	408	Caldwell v. Caldwell	483
Adams v. Muellaire	522	Callahan v. Owen Steel Crane Co.	78
Adamson, Waight v.	306	Case v. Kortz	506
Akers v. Akron, C. & Y. Ry. ,	352	Cechvala v. Madak	286
Akron, Peterson & Wright Co. v.	375	Christy, Western Reserve Na- tional Bank v.	82
American Sheet & Tin Plate Co. v. Lewis	443	Cincinnati v. Hiles	106
Arnold v. Bukowski	205	Cincinnati v. Hopkins	548
Arras v. B. & O. Ry.	387	Cincinnati v. Leeds	212
Ault, Essex v.	478	Cincinnati, Union Stock Yards Co. v.	458
B. & O. Ry., Arras v.	387	Cincinnati, Wolf v.	566
Bankers National Bank, Wett- stein v.	201	Cincinnati Stock Yards Co. v. Cincinnati	458
Barberton, Wise v.	390	Cincinnati Traction Co. v. Dannenfelser	553
Bartlett, Koblitz v.	239	Cincinnati Traction Co. v. Luebkert	126
Bauer v. Nickol	119	Citizens Bank v. High	432
Board of Education v. Hop- kins	548	Cleveland, State ex rel v.	538
Board of Education, State ex rel Bloom v.	520	Cleveland, State ex rel Sav- age v.	250
Bollmeyer & Co., Woodbury v.	113	Cleveland Electric Ry. v. Pifer	435
Bradley v. Herron	282	Cleveland Provision Co. v. Hague	34
Bradley v. Schwab	157	Cleveland Ry., Smillie v.	302
Bramley, Village of Euclid v.	453	Cleverdon v. L. S. Electric Ry.	550
Bridge v. State	231	Colby v. Colby	448
Bronson-Kalamazoo Cement Co. v. Second National Bank	323	Columbus Natural Gas Co. v. Dunlap	176
Brooks v. Elyria	356	Conklin v. Tyler	133
Brookside Brick Co., Kob- litz v.	67	Corbett v. Goldwender	451
Brown v. Dusha	310	Dannenfelser, Cincinnati Trac- tion Co. v.	553
Buddenberg v. Wearsch	372	Davey, Holden v.	537
Bukowski, Arnold v.	205	Daider v. W. & L. E. Ry.	165
Burch, Portage Park Land Co. v.	378	Deacon v. Powers	559
Burk, State ex rel v.	399	Deck, Swigerd v.	31
Buxton, C., H. & D. Ry. v. .	22	Deputy State Supervisors, State ex rel v.	190
C., C. & St. L. Ry., Hard- ing v.	534	Devou v. Hughes	97
C., H. & D. Ry. v. Buxton ..	22	Dominick, Stone-Fuller Co. v.	556
C. & P. Ry. v. State	61	Dunlap, Columbus Natural Gas Co. v.	176
C., P. & E. Electric Ry., N. Y. C. & St. L. Ry. v.	511	Dusha, Brown v.	310
Cairl, Holmes v.	289		

TABLE OF CASES.

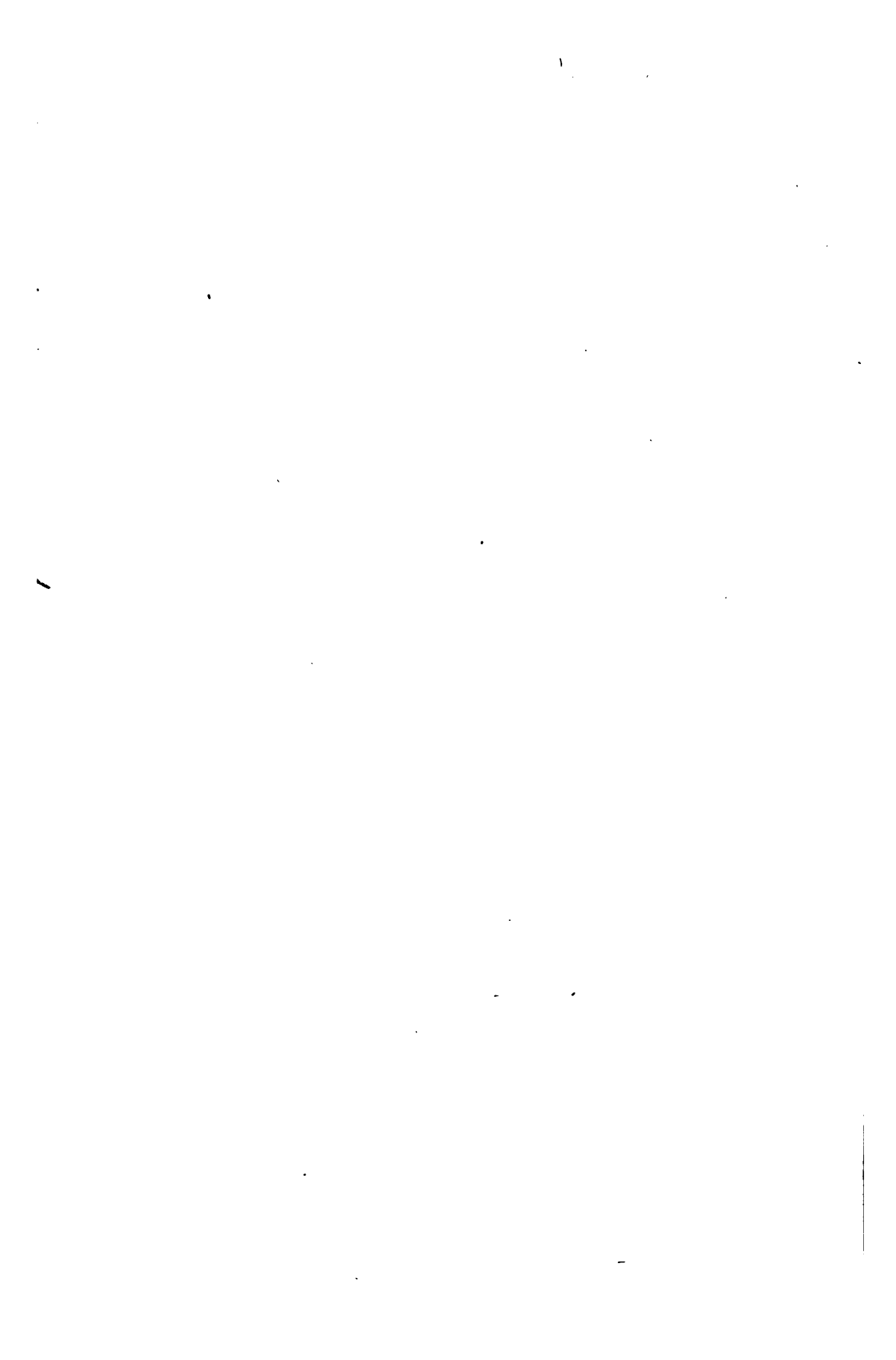
Elyria, Shute v.	383	Holden v. Davey	537
Essex v. Ault	478	Holland, Gillespie v.	17
Euclid v. Bramley	453	Holmes v. Cairl	289
Eureka F. & M. Ins. Co., Mc-		Holmes v. Fackelman	109
Kelvey Co. v.	88	Hopkins, Board of Education	
Evans, Robson v.	122	v.	548
Evans v. Vaughan	425	Hopkins, Cincinnati v.	548
Excelsior Oil Co., Schofield		Hopkins, Porter v.	548
v.	513 and 525	Hopkins, State ex rel v.	548
Fackelman, Holmes v.	109	Houran v. Whitney	489
Firemen's Pension Fund, State		Howard v. Koblitz & Co.	95
ex rel v.	13	Huff, Humphrey & Son v. ...	178
First National Bank of Ell-		Hughes, Devou v.	97
wood, Frazier v.	562	Hull v. Kaufman	243
Frazier v. First National		Humphrey & Son v. Huff ...	178
Bank	562	Hunt v. State	111
Friedman, Strauss v.	158	Huntsman, Wittstein v.	404
George Wiedemann Brewing		In re Osborn Bank	575
Co. v. Herman	187	In re Petition to Prohibit Sale	
Giddings v. Schmuck	142	of Liquor (Cleveland) ...	26
Gillespie v. Holland	17	Insurance Co., McKelvey v. ..	88
Globe Rutgers Ins. Co., Sher-		Jewel Tea Co. v. Willson	233
win-Williams Co. v.	151	John C. Roth Packing Co. v.	
Goff v. Moore	224	Williams	362
Goldwender, Corbett v.	451	Johnson, McLean v.	503
Golner v. Luttner	137	Johnson v. Policemen's Be-	
Gould, Hammel v.	468	nevolent Assn.	487
Graves, State ex rel v.	190	Jones v. State	542
Gross v. Whitlaw	116	Jury v. State	139
Gunderson, Harlan v.	462	K. B. Company, Wilcox v. ...	452
Gustafson v. Ursales	275	Kaufman, Hull v.	243
Gutt v. Pennsylvania Co.	227	Keefer v. State ex rel Fitz-	
Hague, Cleveland Provision		gerald	474
Co. v.	34	Keefer, State ex rel Mungavin	
Haker v. Serhant	446	v.	417
Hammel v. Gould	468	Keefer, State ex rel Wels v.	366
Harding v. C., C., C. & St. L.		Klein v. Solomon Bros.	162
Ry.	534	Knestrick v. Knestrick	570
Harlan v. Gunderson	462	Koblitz v. Bartlett	239
Harris v. State	356	Koblitz v. Brookside Brick Co.	67
Hattiesburg Trust Co., Feitch		Koblitz & Co., Howard v. ...	95
Co. v.	246	Kortz, Case v.	506
Hemington, Smith & Son v. .	336	Koukolicek v. Ladies Catholic	
Herman, George Wiedemann		Benevolent Assn.	291
Brewing Co. v.	187	L. E. & W. Ry. v. Northern	
Herron, Bradley v.	282	Ohio Traction Co.	345
Hessling, Woolson v.	583	Ladies Catholic Benevolent	
High, Citizen's Bank of Car-		Assn., Pinta v.	291
dington v.	432	Lake Shore Electric Ry., Cle-	
Hiles, Cincinnati v.	106	verdon v.	550
Hill v. Pere Marquette Ry. ..	236	Lakewood Land & Improve-	
Hocking Valley Ry., Quinn		ment Co., Snyder v.	295
Coal Co. v.	420		

TABLE OF CASES.

VII

Lancken v. Platt	9	Policemen's Benevolent Assn., Johnson v.	487
Larson, McDowell v.	314	Portage Park Land Co. v. Burch	378
Leeds, Cincinnati v.	212	Porter v. Hopkins	548
Leonard v. State ex rel Scott	340	Post v. State	395
Lewis, American Sheet & Tin Plate Co. v.	443	Potter v. Potter	58
Lieblein v. Lieblein	476	Powers, Deacon v.	559
Lloyd v. Toledo	47	Praschl v. McMahon	545
Luebker, Cincinnati Traction Co. v.	126	Prentiss v. Woods	380
Luttner, Golner v.	137	Presbyterian Church, Rut- ledge v.	221
McDowell v. Larson	314	Quinn Coal Co. v. Hocking Valley Ry. Co.	420
McGill v. Weber	450	R. & G. Deacon v. Powers	559
McKelvey v. Eureka F. & M. Ins. Co.	88	Railway, Arras v.	387
McLaughlin v. State	492	Railway v. Buxton	22
McLean v. Johnson	503	Railway v. C., P. & E. Ry. ..	511
McMahon, Praschl v.	545	Railway, Davider v.	165
Mt. Nebo School District, State ex rel v.	422	Railway, Harding v.	534
Madak, Cechvala v.	286	Railway, Hill v.	236
Moore, Goff v.	224	Railway v. Northern Ohio Traction Co.	345
Morton v. Murray	481	Railway, Quinn Coal Co. v.	420
Muellaire, Adams v.	522	Railway, Ruggiere v.	74
Murray, Morton v.	481	Railway v. S., N. & M. Electric Ry.	408
N. & S. S. Ry., Ruggiere v. ..	74	Railway, Sherman v.	464
N. Y. C. & St. L. Ry. v. C., B. & E. Ry.	511	Railway v. State	61
Nernst Lamp Co., Weber v. .	279	Rawson v. Olds Motor Works	182
Newark v. Newark Natural Gas Co.	254	Rice v. Rice	173
Northern Ohio Traction Co., L. E. & W. Ry. v.	345	Robinson, Sly v.	297
O'Farrel v. Sunday Creek Coal Co.	438	Robson v. Evans	122
Olds Motor Works, Rawson v.	182	Roth Packing Co. v. Williams	362
Orr v. Shoemaker	210	Ruggiere v. N. & S. S. Ry. ...	74
Osborn Bank, In re	575	Rutledge v. Presbyterian Church	221
Owen Steel Crane Co., Calla- han v.	78	S. N. & M. Electric Ry., A. & C. Junction R. R. Co. v. ..	408
Pfaff v. State	395	Sanders v. State	395
Peltch Co. v. Hattiesburg Banking Co.	246	Schmidt v. Schalm	99
Pennsylvania Co., Gutt v.	227	Schmuck, Giddings v.	142
Pere Marquette Ry., Hill v. .	236	Scofield v. Excelsior Oil Co.	513 and 525
Peterson & Wright Co. v. Akron	375	Schwab, Bradley v.	157
Petition to Prohibit the Sale of Liquor	26	Second National Bank, Bron- son-Kalamazoo Cement Co. v.	323
Pifer, Cleveland Electric Ry. v.	435	Serhant, Haker v.	446
Platt, Lancken v.	9	Sherman v. T. & O. C. Ry. ...	464
		Sherwin-Williams Co. v. Rut- gers Fire Ins. Co.	151
		Sherwood, Woodbury v.	113
		Shoemaker, Orr v.	210

Shute v. Elyria	383	Sunday Creek Coal Co., O'Farrell v.	438
Sly v. Robinson	297	Swigerd v. Deck	31
Smillie v. Cleveland Ry.	302	T. & O. C. Ry., Sherman v. ..	464
Smith v. State	606	Thomas v. Watt	500
Smith & Son v. Hemington ..	336	Toledo, Lloyd v.	47
Snyder v. Lakewood Land Co.	295	Trustees Firemen's Pension Fund, State ex rel v.	13
Solomon, Klein v.	162	Tyler, Conklin v.	133
Spencer, Weeks v.	1	Union Railway, Stafford v. ..	129
St. John Nepomictine Society v. Zoulek	146	Ursales, Gustavson v.	275
Stafford v. Cleveland Ry.	129	Vaughan, Evans v.	425
State, Bridge v.	231	Veelman, Potter v.	58
State, C. & P. Railroad v.	61	Waight v. Adamson	306
State, Harris v.	356	Watt, Thomas v.	500
State, Hunt v.	111	Wearsch, Buddenberg v.	372
State, Jones, v.	542	Weber, McGill v.	450
State, Jury v.	139	Weber v. Nernst Lamp Co. ...	279
State, Pfaff v.	395	Weeks v. Spencer	1
State, Post v.	395	Western Reserve National Bank v. Christy	82
State, Sanders v.	395	Wettstein v. Bankers National Bank	201
State, Smith v.	606	Wheeling & Lake Erie Ry., Davider v.	165
State ex rel Bloom v. Board of Education	520	Whitelaw, Gross v.	160
State ex rel v. Cleveland	538	Whitney, Houran v.	489
State ex rel v. Deputy Supervisors of Election	190	Wilcox v. K. B. Co.	452
State ex rel Fitzgerald, Keefer v.	474	Williams, Roth Packing Co. v.	363
State ex rel v. Hopkins	548	Wilson, Jewel Tea Co. v. ...	233
State ex rel, Leonard v.	340	Wise v. Barberton	390
State ex rel McCray v. Burk	399	Witt, State ex rel Bartholomew v.	529
State ex rel v. Mt. Nebo Special School District ...	423	Wittstein v. Huntsman	404
State ex rel Mungavin v. Keefer	417	Wolf v. Washburn	566
State ex rel Savage v. Cleveland	250	Woodbury v. Bollmeyer & Co.	113
State ex rel v. Trustees Firemen's Pension Fund	13	Woods, Prentiss v.	380
State ex rel Weis v. Keefer .	366	Woolson v. Hessling	583
State ex rel v. Witt	529	Zoulek, St. John Nepomictine Society v.	146
Stowe-Fuller Co. v. Dominick	556		
Strauss v. Friedman	158		



OHIO CIRCUIT COURT REPORTS

NEW SERIES—VOLUME XX.

CASES ARGUED AND DETERMINED IN THE CIRCUIT
COURTS AND COURTS OF APPEALS OF OHIO.

DETERMINATION AS TO WHETHER A CONVEYANCE WAS FRAUDULENT.

Circuit Court of Cuyahoga County.

ELIZABETH WEEKS v. FRANK O. SPENCER ET AL.

Decided, May 27, 1913.

*Fraudulent Conveyance—Action to Set Aside—Laws of State Where
Transaction Occurs, Govern.*

1. A fraudulent conveyance made with intent to hinder, delay and defraud creditors, will not be set aside under Section 67-e, of the National Bankruptcy Act, unless made within four months next preceding the filing of a petition in bankruptcy, nor under Section 6343 of the Revised Statutes of Ohio, unless the person to whom the conveyance was made knew at the time of the transaction of the fraudulent intent on the part of the debtor.
2. Where a husband citizen of Ohio becomes indebted to his wife in the United States and in payment of that indebtedness delivers to her in Italy a conveyance of his interest in a trust estate held in the state of Ohio, the transaction is governed by the laws of Ohio and not by the laws of Italy.

H. J. Doolittle and C. R. Bissell, for plaintiff.

White, Johnson & Cannon, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

This suit was originally brought by Elizabeth Weeks to have set aside an assignment or transfer of property made by Frank O. Spencer to his wife, Margaret T. Spencer. This transfer or assignment was made on the 10th day of June, 1908, at a time when Frank O. Spencer was insolvent.

On the 16th day of August, 1910, Frank O. Spencer filed a voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Ohio, and in that proceeding he was adjudged a bankrupt, and Clarence R. Bissel was appointed trustee of his estate in bankruptcy, and thereupon he was substituted for the plaintiff in the action brought by Mrs. Weeks. This was done in pursuance of Section 70e of the Bankrupt Act, which provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover any property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.

It may be said here that the original plaintiff, Elizabeth Weeks, proved up the claim which she held against Spencer in the bankruptcy proceedings, and the same was allowed. She made no claim for a lien in making her proof in the bankruptcy court.

The bankrupt act provides, in Section 67e, as follows:

“All conveyances, transfers, assignments or encumbrances made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay and defraud creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present, fair consideration.”

A further provision in the same section on the same subject fixes the time as within four months next preceding the filing of the petition in bankruptcy as being the period for determination that such transfers are null and void.

1914.]

Cuyahoga County.

Since this assignment was made much more than four months prior to the proceedings in bankruptcy, it is clear that if the transfer can be set aside, it must be done because of the provisions of the statutes of the state of Ohio.

The statute in force at the time of the alleged transfer by Spencer to his wife, was Section 6343 of the Revised Statutes, which reads:

“Every sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, transfer, conveyance, mortgage or assignment made or judgment procured by him or them to be rendered in any manner with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors. Provided, however, that the provisions of this section shall not apply unless the person or persons to whom such sale, conveyance, transfer or mortgage or assignment be made knew of such fraudulent intent on the part of the debtor or debtors.”

This last clause appears first in the amendment of the section passed on the 30th of April, 1908, found in 99 O. L., 241.

The same proposition, however, had already been held in a construction of the statute prior to this amendment, in *Babilya v. Priddy*, 68 O. S., 373, in which the court sustained a purchase made in good faith and for fair value from an insolvent debtor, and in speaking of such sale used this language:

“Such transfer must be held valid as to such purchaser, even though the seller may have made the sale in contemplation of insolvency or with the design to prefer one or more creditors to the exclusion of others, or with the intent to hinder, delay or defraud his creditors, even though a deed of assignment made by such debtor was filed therein ninety days after such sale.”

And in the case of *Lytle v. Baldinger*, 84 O. S., 1, the first clause of the syllabus reads:

“A petition to set aside a fraudulent sale or transfer made in violation of the provisions of Section 6343, Revised Statutes, which does not aver that the person to whom the sale, convey-

ance, transfer, mortgage or assignment is made, knew at the time of the transaction of the fraudulent intent on the part of the debtor, does not state facts sufficient to constitute a cause of action."

So that, unless it be found that Spencer made this transfer to his wife with the design to prefer one or more creditors to the exclusion in whole or in part of others, or that it was a transfer made by him with intent to hinder, delay or defraud creditors and that the transferee knew these facts at the time, the transfer must be found to be good and the claim of the trustee denied. And this brings us to a consideration of the facts for the purpose of determining whether they bring the transfer or assignment of Spencer to his wife within the provisions of the statute.

The property which it is charged was fraudulently transferred by Spencer to his wife consisted of such rights as he had under the will of Phineas M. Spencer, deceased, which was duly admitted to probate in this county, and which provides among other things, that after the payment of certain bequests made in the will, "all the rest and residue of my property and estate, of every kind and description, I give and bequeath as follows: The remaining one-fourth to my executor or trustee, to be held in trust during the life of Charlotte M. Spencer, the widow of my late brother A. K. Spencer, and the income during such period to be paid to her semi-annually or oftener, and upon her death, one-half of the principal of such fund so held in trust during her life, shall be paid or delivered to Florence Murphy, if living, or if deceased, to her next of kin under such statutes, and the remaining one-half thereof shall be held in trust by my trustee during the joint lives of my nephew, Frank, and his wife, Margaret, and the life of the survivor of them. During their joint lives the income from the fund shall be paid for their joint maintenance while and so long as they live together as husband and wife, and accumulated during any period during which they shall not live together. During the lifetime of the survivor, the income shall be paid to such survivor, and on the death of such survivor, if their son, Frederick Albert

1914.]

Cuyahoga County.

Spencer, be then of age and a resident and citizen of the United States of America, such fund and its accumulations shall thereupon be transferred to him, and if he be a minor the income thereof may, during the period of his minority be, at the discretion of my trustee, applied to his proper maintenance and education with a view of his becoming such citizen, and thereupon, upon his arriving at age, the principal and any accumulations thereon shall be paid to him on the condition of his then becoming a resident and citizen of the United States."

It will be seen that the portion of the estate of the testator in which Frank O. Spencer had any interest (for the Frank Spencer mentioned in the will is the defendant F. O. Spencer in this action, and his wife Margaret mentioned in said will is the Margaret T. Spencer, defendant in this action) was one-half of the one-fourth residuum of the estate of which his mother, during her lifetime, was to receive the entire income. At her death this one-half of one-fourth was to be held in trust by the trustee. The trustee which actually had this money in trust was the Citizens Savings & Trust Company.

At the time of this transfer, the mother of Frank O. Spencer, who was to have the income of this property during her life, was still living, so that no part of the income was yet payable to either Frank or his wife. Not only so, but for a considerable time prior to such assignment Frank O. Spencer and his wife had been living apart. They have a son who was living at the time of this transfer, and who is still living, being the Frederick Albert Spencer named in the will.

The amount of property, the income of which it is provided in the will shall go to Frank and his wife while they are living together and to the survivor if one of them should die, is about \$34,000.

At the time of the marriage of Frank O. Spencer and his wife, she received from her mother about \$924.50 which she put into the hands of her husband to be deposited for her. He failed to make the deposit and had never paid it back before the time of this assignment or transfer. This certainly constituted a good and valuable consideration for the transfer by him to her

of some property in payment of that debt. The value of his interest in the bequest was very uncertain; it depended, among other things, on the length of time which his mother should live; it depended in a measure upon whether he should outlive his wife; it depended, during their joint lives after the death of his mother, upon the length of time they should live together. They had separated and lived apart for a considerable time before this transfer was made, and whoever purchased his rights under that will would be purchasing that which is sometimes not inaptly spoken of as a "pig in a poke." It was a purchase of something which might never bring any return, and which, if it did bring any return, depended on so many things that nobody could say what it was worth. He made out the assignment on the 10th day of June, 1908, here in Ohio, and immediately deposited it with the Citizens Savings & Trust Company, the trustee under his uncle's will. He then went to Italy where his wife was, taking a duplicate of this transfer and delivering it to her in Italy. She accepted it and expressed herself as satisfied. The assignment itself expresses that it is in payment and full settlement of the claim which Margaret had against him for this \$924.50, together with interest from the time it was taken by him, to-wit, May 4, 1904.

Attention has already been called to some of the elements of uncertainty as to the value of this interest of Frank O. Spencer thus assigned. There is a further uncertainty, to-wit, a fractional part of any income to which Frank might be entitled, that might be received from this money while in the hands of the trustee after the death of Frank's mother. The will provided for its being paid to Frank and his wife for their joint support. Whether this would entitle each of them to one-half while they were living together, we do not undertake to say, but regard it as a matter of grave doubt, and as therefore affecting the value of any interest which Frank might have in such income which at the time of this transfer to his wife, he could have transferred to anybody.

The evidence fails to show that Margaret T. Spencer had any knowledge or intimation or suspicion that Frank was making

this transfer to her for the purpose of hindering, delaying or defrauding any creditors. The amount of her claims as compared with the very uncertain value of Frank's interest under this will of his uncle, we think is sufficient, in the absence of evidence showing knowledge on her part of some fraudulent intent, to sustain the transfer made to her.

It is said, however, that this transfer to her was a contract made in Italy, and that it must be governed by the laws of Italy at the time the contract was delivered to her, and evidence is introduced of certain provisions of the law of that country. Without stopping to read these provisions, the effect of them apparently is that under the law of Italy, a wife can not alienate or dispose of her dowery without authorization of a proper judicial tribunal. Even if it be held that this contract or assignment of Frank to his wife is to be governed by the laws of Italy, we find nothing that would prohibit the wife from accepting payment of an indebtedness to her, which indebtedness accrued in a foreign country, though the payment should be made in Italy. By this contract Mrs. Spencer was not disposing of any dowery which she had. The money which she had furnished to her husband was given to her, it is said, as dowery by her mother in Austria, where the marriage between these people took place, and that dowry, the money she had long before the time of this contract in Italy, had been taken by her husband; she did not have it.

Under the facts hereinbefore recited, her husband, by reason of having used this money which had come to her as dowery, became indebted to her in America; that debt was still subsisting, and she accepted this transfer in payment of that indebtedness, and to hold that, therefore, the contract was invalid would be to hold that a contract made between citizens of the United States of America paid in some foreign country, while they were abroad, and completely executed, did not bind the parties because, if the contract by which the indebtedness was created had been made in Italy, it would not have been enforceable. We do not, therefore, regard it as essential for the disposition of this case, to determine whether the laws of Italy in relation to dowery

would affect a contract made by the citizens of the United States between themselves while they were temporarily in Italy, would be valid or invalid. Under the laws of the United States where the contract by which Frank became indebted to his wife because of his use of this money, which is the implied contract that where money is put into his hands, to be used for the party so putting the money into his hands, and it is used for another purpose, the party thus using the money is obligated to pay it back, and it was simply the settlement of that American contract which was made in Italy. If the completion of the contract by delivery of the writing of transfer to Margaret was the time when the contract became effective, still it was simply an agreement to release a claim on which, under an American contract, implied it is true, but still a contract, Frank became indebted to his wife.

We have not discussed the question of the right of the trustee here to enforce any lien which, by possibility, it might be claimed Mrs. Weeks had on any interest of Frank under this will, because, as we understand the law, when Mrs. Weeks proved up her claim in bankruptcy and had it allowed, she released any lien. If she had any before that time, and it may well be doubted, the trustee in bankruptcy having only the rights in this action which Mrs. Weeks would have had, had the case continued in her name without the intervention of any bankruptcy proceedings. Whether he could have maintained the action even if the transfer had been known by Mrs. Spencer to have been in violation of the rights of other creditors, we have not regarded as essential to the disposition of this case to determine.

We therefore reach the conclusion that the trustee in bankruptcy has no rights of Frank O. Spencer in any income or property growing out of this will of Phineas M. Spencer, deceased, and that all the rights which Frank otherwise would have under said will are now the property of Margaret T. Spencer, and a decree will be entered accordingly.

1914.]

Cuyahoga County.

PROOF REQUIRED AS TO RELEASE OF EQUITY.

Circuit Court of Cuyahoga County.

HENRY LANCKEN V. WILLIAM G. PLATT.

Decided, June 3, 1912.

Trustee—Release to, by Cestui—Evidence Must be Clear and Convincing.

When one holds property as trustee for another and claims that such other has released his equity therein upon sufficient consideration, the evidence of such release must be clear and convincing.

Dissette, Dissette, Dissette & Reynolds, for plaintiff.*C. F. Taplin and White, Johnson & Cannon*, contra.

NIMAN, J.; MARVIN, J., concurs; WINCH, J., not sitting.

In March, 1903, the original plaintiff, Henry Lancken, was the owner of a tract of land located in Brooklyn township, Cuyahoga county, Ohio, consisting of about twenty-five acres. He was also the owner of another parcel of real estate on Franklin avenue, in the city of Cleveland. The twenty-five acre tract was incumbered by a mortgage to John C. and Louisa M. Pflug, to secure the payment of \$3,500. The Franklin avenue property was covered by mortgages aggregating \$4,250. A Mrs. Humphries owned property on Birch street in the city of Cleveland. About this time contracts were entered into between Lancken and Mrs. Humphries and Lancken and the Pflugs, whereby Lancken was to reduce the incumbrance on the Franklin avenue property to \$1,250 and convey the same, subject to such incumbrance, to the Pflugs in satisfaction of their mortgage against the twenty-five acre tract and in satisfaction of certain other claims held by them against Lancken, while the farm, or twenty-five acre tract, with a mortgage for \$3,500 to be placed against it, was to be exchanged by Lancken for the Birch street property of Mrs. Humphries subject to a mortgage of \$3,500.

To facilitate this deal and apparently to enable a loan to be negotiated, Henry Lancken conveyed the twenty-five acre parcel

to the defendant, William G. Platt, having first executed a mortgage against it to Florence H. Easterman, an employee of the defendant, to secure a note for \$3,450. At the same time the Franklin avenue property was conveyed to the Pflugs. The trade with Mrs. Humphries was never consummated.

The deed to the twenty-five acre tract was placed on record and the title to this property is still in the defendant, who claims to be the absolute owner thereof.

This action was brought by Lancken to have said twenty-five acre tract decreed to be his property and to secure a reconveyance thereof to himself. An accounting of the rents and profits of the land and the money secured by mortgage thereon, and the cancellation of the Easterman mortgage are also sought.

After the suit was begun J. C. Logue, trustee in bankruptcy for Henry Lancken, was substituted as plaintiff, and the action is now prosecuted by him.

It is conceded that the defendant took title to the property in controversy as the agent or trustee of Lancken for the special purpose of negotiating the Easterman note and mortgage, and effecting the exchange of properties with Mrs. Humphries, and discharging the mortgage of the Pflugs. The Humphries deal was never carried out, and the defendant continues to hold the title to the property.

It is the defendant's claim that about June 1, 1903, having been unable to negotiate the mortgage on the farm property, he made an agreement with Lancken whereby Lancken and his wife, in consideration of the surrender of a certain cognovit note for \$367.50 and the cancellation of certain other items of indebtedness, executed a release in writing of all their equity in said property. The decision of this case rests upon the determination of the question whether such a release was in fact executed. The evidence on this subject is clouded with uncertainty. The release itself is not produced. The defendant and Miss Easterman testify that such a release was executed, but that in some way it has been lost. Its contents are testified to in general terms, but rather according to what is supposed to be the legal effect of the document than to its language.

Lancken and his wife both deny absolutely that such a release was ever executed.

The burden of proving that the release was executed as claimed rests upon the defendant. The property having been held by him in trust, he must establish by proof of the required degree, the act on the part of the *cestui que* trust, relied upon as as a relinquishment of his estate. This proof should be clear and convincing.

The defendant, in our opinion, has not sustained the burden of establishing his claim that Lancken and his wife released their interests in the property in controversy.

The fact that Lancken did not list among his assets in the bankruptcy proceedings the interest in his property, afterward asserted by him, and the fact that he neglected to start this action until more than four years after the land was deeded to the defendant, are urged as showing that he did not consider that he had any interest therein.

Lancken explains his course in this respect by testifying that he was advised by the attorney that represented him in the bankruptcy proceedings that he could not list this property as an asset, and that he supposed that the bankruptcy proceedings had put an end to his interest in said property, until he was requested to execute a quit-claim deed to another parcel of land adjoining that involved in this action.

Whatever may have been Lancken's conduct with reference to this property, it does not supply the proof lacking to establish the defendant's claim of absolute ownership of the twenty-five acre tract of land.

According to this view of the case it follows, of course, that the defendant must account to the plaintiff, the trustee in bankruptcy, for the rents and profits of the farm and the other moneys received by him as the agent of Henry Lancken. He should be charged with the rents actually received, and with such other sums as came into his hands in the course of his agency, and credited with his disbursements.

The defendant can not, however, be allowed anything on account of the cognovit note for \$367.50 which is claimed to have

furnished part of the consideration for the execution of the alleged release. That note was surrendered to Lancken as paid, and since we find under the evidence that no such release has been shown to have been executed, it necessarily results that this note must have been paid in some other manner, probably by the transaction relating to the Quincy avenue property, one of the matters dealt with by the evidence.

According to the figures in evidence, such an accounting shows a balance of \$2.39 due the plaintiff.

On the subject of compensation it is urged on behalf of the defendant, that in case it should be held that he has not so established the release in dispute as to be entitled to retain the property, he should be adequately compensated for his services in connection therewith.

On the plaintiff's part it is contended that the defendant being in the position of trustee, and having denied the trust, is not entitled to compensation.

The defendant undoubtedly performed services of considerable value in preserving this property from sale under foreclosure proceedings. At the time the property was deeded to him it was incumbered to practically its full value. While there is no evidence before us as to its present value, it may fairly be assumed from the efforts put forth on both sides of this action to obtain the property, that it has so increased in value that a considerable equity in it now exists.

The services rendered by the defendant dealt, also, with other property and other liens than are involved here, and a considerable part of said services were rendered before any dispute as to the ownership of the land arose.

Under all the circumstances of the case considering the doubt and uncertainty with which many features of this case are surrounded, and considering also the undoubted benefit which has resulted from the defendant's services, we allow him as compensation the sum of \$325, which will be made a charge against said premises subject to the valid and existing liens thereon.

The notes of Henry Lancken and Mary Lancken to the Pflegs, and the mortgage securing the same, should be canceled and

1914.]

Cuyahoga County.

surrendered by the defendant, as should also the note and mortgage to F. M. Easterman for \$3,450.

A decree for the plaintiff will be entered, and a journal entry may be prepared in accordance with the findings herein indicated.

RIGHTS OF A PENSIONED FIREMAN.

Circuit Court of Cuyahoga County.

THE STATE OF OHIO, EX REL JOSEPH ROTHGERY, V. THE BOARD
OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF
THE CITY OF CLEVELAND.

Decided, June 3, 1912.

*Firemens' Pension Fund—Pensioned Fireman Can Not be Discharged
for Offense Before Retirement.*

A fireman who has been retired and regularly put upon the pension roll in accordance with the laws of the state and the regulations of the trustees of the firemens' pension fund, can not thereafter be discharged from the fire department for violating one of its rules before his retirement, and his pension be reduced.

Geier, Farrell & Edwards, for plaintiff in error.

E. K. Wilcox, contra.

NIMAN, J.; MARVIN, J., concurs; WINCH, J., not sitting.

This is an action brought in this court by the relator to secure a writ of mandamus to compel the Board of Trustees of the Firemen's Pension Fund of the City of Cleveland to authorize the payment to him of the sum of \$2,895, with interest, claimed to have been unlawfully withheld from him from June 1st, 1906, to April 1st, 1912, and to authorize the payment to him from the 1st day of April, 1912, of a pension in the amount which he claims to be entitled to recover.

The Board of Trustees of the Firemen's Pension Fund of the city of Cleveland exists under and by virtue of an enactment of the state Legislature, which is now found in the General Code from Section 4615. By Section 4600 it is provided:

"In any municipal corporation, having a fire department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a firemen's pension fund. There a board of trustees, who shall be known as 'trustees of the firemen's pension fund,' shall be created, which shall consist of the director of public safety, and, in villages, of the fire chief and five other persons, members of such department. But upon petition of a majority of the members of the fire department, such director or fire chief may designate a less number than five to be elected trustees."

By various other sections provision is made for the creation of a pension fund, and Section 4612 proceeds:

"Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the account thereof, but no rules or regulations shall be in force until approved by the director of public safety or the fire chief as the case may be."

Under the authority conferred by the section last quoted. the Board of Trustees of the Firemen's Pension Fund of the City of Cleveland adopted certain rules and by-laws, a part of Section 3, which is as follows:

"Any member of such fire department who has been in the service of said paid fire department thirty years, the last twelve years consecutively, may, upon making written application to the person or persons in charge of the fire service of such city, retire at his own option without medical examination, and the board of trustees shall authorize the payment to such member, so retired, monthly from the pension fund, of a sum equal to eleven-sixteenths of his salary at the time of retirement."

The relator became a member of the paid fire department of the city of Cleveland on the 11th day of October, 1871, and served continuously for more than thirty-three years. On April 21st, 1905, he availed himself of the rule quoted and asked to be relieved from active duty and to have his name placed on the firemen's pension roll. On June 1, 1905, due action having been taken, his name was placed upon the pension roll, and under the rule he received a pension monthly equal to eleven-sixteenths of his salary.

1914.]

Cuyahoga County.

Subsequently, however, he was discharged from the fire department for violating one of the rules of the department before his retirement. The board of trustees of the pension fund took such action that his name was placed upon the pension roll at a rate equal to six-sixteenths of his salary per month from the time of his discharge on February 10, 1906, instead of eleven-sixteenths which he had received up to that time.

In taking this action the board claims to be sustained by that part of Section 3 of the rules and by-laws which provides:

“That any member who may be discharged from the fire department after having served not less than eighteen consecutive years, shall be placed on the pension roll at six-sixteenths of his salary at the time of his discharge, provided such discharge is for any other offense than dishonesty, intoxication or a criminal act.”

We are, therefore, required to determine whether the Board of Trustees of the Firemen's Pension Fund had power to change the status of the relator as a beneficiary under the pension fund, after he had retired at his own option, and after his name had been placed upon the pension roll at the rate provided for one in his class.

Reference to the rule under which the relator retired, and had his name placed upon the roll at a rate equal to eleven-sixteenths of his salary, discloses a requirement that “the member so retired without special disability shall always receive the same amount of pension as when retired.”

If this part of the rule be given effect according to its clear terms, the rights of the relator were fixed when his name first went upon the pension roll.

In the absence of this requirement of the rule, we think that when the relator retired under the rules, and the payment of his pension was authorized and his name placed upon the pension roll, all questions affecting his status were determined, and the subsequent act of the Board of Trustees, based upon his discharge after retirement, was without authority, and could not affect his status as already fixed.

In *People, ex rel Fitzpatrick, v. Greene*, 181 N. Y., 308, a question similar to that presented here was involved and it was there held, quoting from the syllabus:

“Whatever may be the nature or form of the charges which will prevent the retirement on a pension of a member of the police force of the city of New York, who is a veteran, has served twenty years and has made application therefor under Section 3555 of the charter (L. 1901, ch. 466) providing that he must be relieved if ‘there are no charges against him pending,’ an anonymous communication, containing no statement of an act, default or neglect upon his part which would constitute a breach of duty, although certain statements were made therein which by argument or inference might reflect upon him as a public officer, in the possession of the commissioner two weeks before the application for retirement was fixed and upon which no charges were formulated, can not be regarded as a charge ‘pending’; and the subsequent formulation of charges, his trial thereon and removal, can not affect his status as a retired member of the force.”

All the facts necessary to entitle the relator to retire at his own option, without medical examination, were present. Upon his exercise of the option given him, the mandatory language of the rule required the board of pension trustees to authorize the payment to him monthly from the pension fund of a sum equal to eleven-sixteenths of his salary at the time of retirement, “and he shall always receive the same amount of pension as when retired.”

There are sufficient funds to the credit of the pension fund to pay the relator the pension he is entitled to receive at the rate of eleven-sixteenths of his salary per month.

The powers and duties of the board of trustees of the pension fund with respect to the payment of the pension, to which the relator is now entitled, are purely ministerial. There is nothing calling for the exercise of discretion, or judgment upon the propriety of the thing to be done.

The writ of mandamus may issue as prayed for by the relator.

1914.]

Guernsey County.

CONVERSION OF PERSONAL PROPERTY.

Court of Appeals for Guernsey County.

GILLESPIE & McCULLEY V. JAMES HOLLAND AND SUSAN HOLLAND.

Decided, April Term, 1914.

Wrongful Possession or Dominion—Gives Right of Action for Conversion—Application of the Statute of Limitations.

1. It is not necessary for the party taking wrongful possession of personal property of another to assert absolute ownership of the property in order to give the owner, who is entitled to the immediate possession, the right to an action for conversion, but any unauthorized act which deprives the owner of the possession of his property, or the exercise of any dominion over the property inconsistent with his possession, is sufficient.
2. The statute of limitations begins to run at the time the right of action accrued, and an action for the conversion of personal property is barred within four years after that time.

R. T. Scott, for plaintiffs.*Rosemond, Bell & Dugan*, contra.

POLLOCK, J.; METCALFE, J., and NORRIS, J., concur.

The defendants in error brought an action in the court of common pleas of this county, in which they alleged that on or about the — day of October, 1908, the plaintiffs in error wrongfully converted to their own use certain articles of household furniture owned by the defendants in error.

The answer of the defendants below contained two defenses, but it is now only necessary to refer to the second defense, which was a plea of the statute of limitations, alleging that the cause of action did not accrue within four years prior to the bringing of the action.

The case went to trial to a court and jury, resulting in a verdict and judgment in favor of the plaintiffs below, and to reverse that judgment this action is prosecuted.

The plaintiffs below had been residents of the city of Cambridge, and the defendants were engaged in the furniture busi-

ness in that city. While the plaintiffs below were living in that city they purchased from defendants below some articles of furniture and failed to pay the entire purchase price, leaving unpaid \$25.85. Sometime after the purchase of this furniture plaintiffs below stored this and other furniture which they owned, in a room in the city, and moved to the state of Illinois. After plaintiffs below left the city the defendants below took this furniture from the room where plaintiffs had stored it, into their own possession and placed it in their store-room. They had no lien on any of the furniture but only an account against plaintiffs below for the amount referred to above.

On January 22d, 1907, after defendants below had taken possession of the furniture, they wrote to plaintiffs below stating that they had taken possession of their furniture, and that there was a balance due them of \$25.85, and one dollar storage, and that they were willing to sell sufficient of these goods to pay their claim, and to send plaintiffs below the balance of the goods.

After this the defendants below wrote plaintiffs below a number of letters saying that they would sell the furniture, and apply the amount received therefor to the payment of their claim, unless plaintiffs below paid the claim. The last letter was written on May 5th, 1908, saying that if plaintiffs below did not promptly comply with this request that defendants below would take judgment and sell this property. In all these letters defendants below say that the furniture is the property of plaintiffs below, but they always asserted their intention to hold this property until the debt which plaintiffs below owed them was paid, and if their demand was not complied with they would sell the property. Plaintiffs below gave defendants below no right to take the property from the room in which it was stored to their store-room. The defendants below retained possession of this furniture until some time after July 12th, 1908, and then sold it.

At the close of the testimony the defendants below requested the court to give the jury in charge the following:

"If you find that the defendants took unlawful possession of the personal property in the petition described, then the court

1914.]

Guernsey County.

says to you that the cause of action in favor of the plaintiffs accrued at the time of the taking, if plaintiffs then knew of the same, but if they did not know, then as soon as they discovered that the goods had been taken, and the party who had taken them."

This was refused by the court and exceptions noted. In the general charge the court said in substance that if defendants were holding these goods as goods of plaintiffs, then a cause of action would not accrue until after defendants sold such goods. and if that were after July 12th, 1908, then the statute of limitations would not have run against the action, the petition having been filed July 12th, 1912.

The only question to be determined by this court in this action is whether the cause of action accrued at the time defendants below took the furniture from the room in which it had been stored by plaintiffs below into their possession, and removed it to their store-room, or at the time defendants sold this furniture.

The right to an action of conversion of personal property depends upon the wrongful possession by one party of the property of another. It is the wrongful taking of the property that gives the right of action to the owner of the property against a wrong-doer. The mere fact that the wrong-doer says, "I have taken possession of your property," does not relieve him from the action of conversion when he has wrongfully taken possession of the property and is asserting the right to retain that possession until some demands of his are complied with. It is not necessary for the party taking wrongful possession of property to assert absolute ownership of the property in order to give the owner of the property the right to an action for conversion. If the owner, entitled to the immediate possession of his property, has been deprived of that possession by the unauthorized act of another, or by the exercise of dominion over the property inconsistent with the right of possession of the owner, it is a conversion of the property.

"Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion. 'The action or trover being founded on a conjoint right of property and possession, any act of the defendant which

negatives or is inconsistent with such right, amounts, in law, to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use.' While, therefore, it is a conversion where one takes the plaintiff's property and sells or otherwise disposes of it, it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the plaintiff's right." *Cooley on Torts*, starred page 448.

Of the numerous cases sustaining the principle referred to above we will only cite the following: *Bristol v. Burt*, 7 Johnson, 254 (5 Amer. Dec., 264); *Thorp v. Robinson*, 68 Vt., 53 (33 Atl., 396-7); *Trustees of University v. Bank*, 97 N. C., 280 (3 N. E. 359-361); *Omaha, etc., Co. v. Tabor*, 21 Pac., 925-930.

The defendants below took possession of these goods and removed them to their store-room prior to July 22d, 1907. They did this without the permission of the plaintiffs below. This act was a wrongful taking possession of these goods. It is true that they acknowledged the furniture to be the property of the plaintiffs, but they claimed the right to retain that possession until their account against the plaintiffs below was satisfied, and if not paid by plaintiffs below they claimed the right to sell this property, or sufficient of it, to pay their claim, and afterwards did sell the property.

It is claimed on the part of the plaintiffs in error that the right to an action of conversion did not accrue until the disposal of the property by them. The sale of this property by the defendants below did not affect the title of the plaintiffs below in the property in any way. They had title to the property at the time that it was wrongfully taken, and that title continued after the sale of the property, until they brought the action to recover damages for the wrongful conversion.

The defendants below had no right to take possession of the property, and they had no right to sell it after taking possession; but the act of the defendants below in selling the property did not in any way change the right of the owners to take possession

1914.]

Guernsey County.

of the property, or if they saw fit, to recover damages for its wrongful conversion.

“An action for either of the following causes shall be barred within four years after the cause thereof accrued—for the recovery of personal property, or for taking, detaining or injuring.” General Code, Section 11224.

“The statute of limitations begins to run from the time the plaintiff’s cause of action accrues, unless some recognized exception postpones its operation.” 19 American & English Encyc. of Law, 193.

Our attention has been called by the defendants in error to the case of *Glidden v. Mechanics’ National Bank*, 53 O. S., 588, as sustaining their position that the cause of action did not accrue until the sale. In that case the property had been pledged, and the pledgee sold the property to himself. All the court decides in that case is that the statute of limitations did not begin to run until the pledgee did some act that put it beyond his power to perform the conditions of the pledge. The difference between that case and the one we are now considering is that the pledgee in that case had the rightful possession of the property, and the statute did not begin to run until he violated the conditions of the pledge. In the case we are considering the defendants below never had rightful possession of the property, and the wrong was committed at the time they took possession of this furniture.

Our attention is further called to the opinion in the case of *Sammis v. Sly*, 54 Ohio St., 519. The only question the court is there discussing is when the title to property which has been wrongfully taken possession of by another passes from the rightful owner, and they hold that the mere intermeddling with another’s property in a way to deny his title does not of itself divest his title, but that he may treat it as such by commencing an action for conversion. We do not think that this in any way affects the question now before us.

It follows that the right to maintain this action accrued at the time the goods were taken possession of by the defendants below, that it was error for the court to refuse the request to charge, and also error to charge as stated. Further, as there

is no dispute in the evidence as to the time the furniture was taken possession of by the defendants below, the verdict is against the weight of the evidence.

The judgment of the court below is reversed and the case remanded for further proceedings.

**DEATH AT A RAILWAY CROSSING WHERE THE VIEW OF
THE TRACKS WAS HIDDEN.**

Court of Appeals for Hamilton County.

**THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY v.
EDMUND BUXTON, ADMINISTRATOR OF THE ESTATE OF
LEO HERPPICH, DECEASED.**

Decided, June 30, 1914.

Negligence—Milk Wagon Driver Killed at a Grade Crossing—Obstruction of View—Verdict of \$5,400 Held Not Excessive.

1. Where at the intersection of a street and railway tracks at grade there is a high board fence enclosing a coal yard, which completely obstructs the view of tracks from the south until within a few feet of the tracks, and the testimony is conflicting as to whether the electric bell giving warning of approaching trains was ringing or was out of order, a verdict in favor of the administrator of a driver, whose wagon was struck by a train coming from the south at the rate of forty-five or fifty miles an hour, will not be disturbed by a reviewing court.
2. A verdict of \$5,400 on account of the wrongful death of a man thirty-eight years of age, who left a wife and two small children, and who was in perfect health and earning \$20 a month and board as a driver on a milk route, is not excessive.

Waite & Schindel, for plaintiff in error.

Schorr & Wesselman and *Thos. L. Michie*, contra.

JONES, O. B., J.; JONES, E. H., J., concurs; SWING, J., not sitting.

Plaintiff below recovered a judgment for damages for the death of his intestate, Leo Herppich, who was struck and killed

1914.]

Hamilton County.

by a train operated by the plaintiff in error in the village of Lockland, Hamilton county, Ohio, on December 22, 1909.

The decedent was driving a covered milk wagon of the usual type, which was open in front and had open doorways on each side, the driver's seat being in the rear and between these two doorways. He was driving westwardly along Worthington avenue, which is a much traveled highway crossing the C., H. & D. Railway, practically at right angles, just south of its Lockland-Wyoming depot. The line between the adjoining villages of Lockland and Wyoming at that time was along the railroad, the tracks of same being located in the village of Lockland. On the south side of Worthington avenue just east of the railroad was a coal yard being operated by Henry Priessmann, which stood four or five feet above the level of Worthington avenue, and which was surrounded on its north and west sides by a tight board fence so high that a person driving westward on Worthington avenue could not see to the south along the railroad until he was very close to the tracks.

Counsel for plaintiff in error have undertaken, by means of photographs which were introduced in evidence and measurements taken by a civil engineer who testified in the case, to demonstrate the fact that the decedent might have been able to see an engine on the northbound track a distance of from 750 to more than 2,000 feet south of Worthington avenue. The difficulty with these photographs is that counsel failed to fix the location of the camera in the center of Worthington avenue where the decedent was driving, but has evidently fixed it at a point some distance north of the center, and the photographer admitted that the distances appearing in the foreground of the picture were deceptive; and the evidence of the photographs and the engineer was opposed to that of a number of plaintiff's witnesses who had been upon the ground and were familiar with the surroundings, and while not undertaking to give exact distances their testimony convinced the jury that decedent could not have seen, by the most careful looking, the approaching train in time to have avoided the injury.

There is no question, from the evidence, that the train was running at least forty-five to fifty miles per hour, and that the

decedent was driving at a very low rate of speed. There is conflict in the testimony as to whether the whistle and bell were sounded as required by Section 8853 of the General Code. There was an electric signal bell at the crossing, and testimony was introduced to show that at periods shortly before and after the accident this bell was out of order, and there is conflicting testimony as to whether or not this bell was ringing at the time of the accident.

In this state of the record, we do not believe that the reviewing court should invade the province of the jury, and say that it was not justified in finding negligence on the part of the defendant and finding that plaintiff was not guilty of contributory negligence.

It is claimed that the court erred in admitting in evidence an ordinance of the village of Lockland which undertook to regulate the speed of trains within the limits of the village at not more than eight miles per hour. Such an ordinance is authorized by Section 3781 of the General Code and we think it was properly admitted, limited as it was by the charge of the court.

Plaintiff in error urged as another ground of error the refusal of the court to send the jury back to their jury room to agree upon and return a more complete answer to the second interrogatory which had been submitted to them. This interrogatory was as follows:

“Did the deceased, Leo Herppich, as he was about to cross the tracks of the defendant, look to the south?” This was answered by the jury as follows: “We assume he did.”

We think that in the absence of any direct proof to the contrary, the jury were justified in arriving at such an answer. Especially when, as we have stated above, we do not feel justified in disturbing their answer to the first interrogatory, which was as follows:

“Do you find from the evidence that the deceased, Leo Herppich, as he was about to cross the tracks of the defendant, could have looked to the south and seen the train by which he was struck in time to have avoided being struck? Answer No.”

1914.]

Hamilton County.

True, there is testimony by the engineer and at least one pedestrian on the street that they saw the wagon but did not see the driver look out of the wagon. Such testimony is, however, perfectly consistent with the decedent's performing his full duty to look before undertaking to cross, because one seated in such a wagon could no doubt look out through the openings at the sides, down the track, without changing his position, as effectually as he might by thrusting his head out of the wagon; and the engineer's testimony showed that he had paid so little attention to the details of the wagon that he thought its sides were covered solidly with no openings or doorways in them.

It is urged that the amount of the judgment, \$5,400, is excessive. Decedent was thirty-eight years old, in perfect health, and left a wife and two young children aged six and four years respectively. At the time of his death he was living and working, with his family, on his father-in-law's farm, driving a milk route, and received twenty dollars per month and board. We can not, therefore, say that the amount found by the jury is excessive.

Other errors in the admission of evidence and in the charge of the court are urged by counsel for plaintiff in error, but on careful consideration of same the court fail to find any prejudicial error, and the judgment is therefore affirmed.

PETITION TO PROHIBIT SALE OF LIQUOR.

Circuit Court of Cuyahoga County.

**IN RE PETITION TO PROHIBIT THE SALE OF INTOXICATING LIQUORS
AS A BEVERAGE IN A RESIDENCE DISTRICT OF THE MU-
NICIPAL CORPORATION OF CLEVELAND, STATE
OF OHIO; TWO CASES.**

Decided, January 22, 1912.

*Sufficiency of Petition as Against Sale of Liquor—Petition Prima Facie
Evidence of What.*

A petition for or against the sale of intoxicating liquor in a residence district is itself *prima facie* evidence that the signers thereof are resident electors of the district, qualified to sign the petition, and in the absence of evidence tending to show that a signer is not such an elector, it is not error to count his name in determining the sufficiency of the petition.

*W. H. Boyd, G. W. Shaw and G. E. Harshorn, for plaintiff.
Hidy, Klein & Harris, contra.*

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

On the 7th day of August, 1911, there was filed with the Honorable Martin A. Foran, a judge of the court of common pleas of this district, a petition purporting to be signed by a majority of the qualified electors of a certain residence district described in the petition and situated in the city of Cleveland, in favor of prohibiting the sale of intoxicating liquors as a beverage in such district. In short, purporting to be such a petition as is provided for in Section 6140 of the General Code, which reads:

“When a majority of the qualified electors of a residence district of a municipal corporation sign a petition in favor of prohibiting the sale of intoxicating liquors as a beverage in such residence district and file such petition with the mayor of the municipal corporation or with a judge of the court of common pleas of the county in which the municipal corporation is situated, the mayor or judge shall examine the petition at a public hearing and decide upon the sufficiency thereof and cause

1914.]

Cuyahoga County.

a copy of his decision to be filed with the clerk of the municipal corporation or council."

Notice of the filing of this petition was given as provided in Section 6151 of the General Code.

Before said petition was heard there was filed with said judge a writing designated as "Answer of Max Sternlicht," which answer sets out that said Max Sternlicht is a *bona fide* resident and qualified elector residing within the boundaries of the territory described in the petition, and that he files this answer in his own behalf and on behalf of other qualified electors who are residents of said district, and states that said petition is insufficient, irregular and illegal and should be dismissed; it then sets out a large number of reasons why he says it should be dismissed, and among them he sets out that a very considerable number of names which appear on said petition are the names of persons residing outside of the district; a considerable number that he says are duplicated in the petition; a considerable number that he says have not resided within the district for four months, and a considerable number that he says have not resided within the state for a year; some that he says are not of full age; some that he says were never qualified electors, etc.; and then in such writing he says that he objects to each and every name contained in the petition, for the reason that the persons signing the same are not qualified electors and calls for strict proof that they are qualified electors. An objection to the petition was also made by certain other electors or persons claiming to be electors within the district.

This petition was heard by Judge Foran on the 18th of October, 1911, the hearing having been continued from time to time by consent of the petitioners, and by consent also of those who had entered their objections to the hearing. The result of the hearing before Judge Foran was that he found the petition to be sufficient, and certified his findings to the clerk of the city of Cleveland, resulting in the prohibition of the sale of intoxicating liquors within the district described in the petition.

To this action of Judge Foran error is prosecuted in this court, as provided in Section 6164 of the General Code, permission having been giving for the filing of such petition.

The first question raised here is whether, the petition not having been heard within forty days of the time of its filing and therefore having been heard at a time when the certificate provided for could not have been made, and in fact was not made until more than forty days after the filing of the petition, the whole proceedings were not void. In short, whether the judge, having had the petition in his hands for more than forty days, was authorized thereafter to hear it and to make his certificate at a time beyond the forty days.

As was shown on the hearing, this court has heretofore held that the time limit prescribed in this section is directory and not mandatory, and finding in that case reasons why the officer hearing a petition might well have delayed we adhere to the holding in that case, and certainly if any case would justify the delay, the present is such case, because here the only parties objecting to the granting of the petition consented to the delay. There was no error in the court's refusing to dismiss the petition because of the lapse of time.

The next question sought to be raised is whether the burden of showing that those who signed the petition were qualified electors within the district was upon the petitioners. We think it very doubtful whether that question is in this case. Judge Foran certifies that all the evidence offered by either party is in the bill of exceptions. We find, however, on page 25 of the record, that the petition was offered in evidence. We nowhere find the petition or a copy of it in the record. We do find, however, that Judge Foran announced earlier in the hearing that the burden of showing that those who signed the petition were not residents of the district was on those who contested the petition. The petition was offered in evidence and was examined by the judge. The reason it is not here is because of the provision of Section §152 which provides that the judge shall cause a certified copy or certificate of his findings, together with the original petition, to be filed with the clerk of the municipal corporation or council. Complying with that requirement of the statute, of course the original petition could not be filed here. In any event, it was out of the hands of the judge when he

1914.]

Cuyahoga County.

signed the bill of exceptions. How we can say that the judge may not have had such knowledge as to who the parties were who signed this petition as that an inspection of the petition might not be sufficient to satisfy him that the parties who signed it, those whose names he allowed to remain on it as signers, were *bona fide* electors of the district, we are unable to say. However, we are of opinion, at any rate a majority of the court are of opinion, that when the petition was exhibited to the judge, reading, as by law it was required to read and presumably did read, since we have not the petition before us, that those who signed (in the language of the statute), "respectfully represent that we are qualified electors in the following residence district," etc., he was justified in saying that this made a *prima facie* case as to the residence and qualifications of the parties who signed.

True, it was held by Judge Foran, and has been held by this court, that the proceeding is in the nature of a judicial proceeding, and therefore the court must act upon evidence; but having before him a statement that these people were resident electors, we think it was not error to find such to be a fact in the absence of any evidence tending to show the contrary.

The provision with reference to the public hearing of this petition, as provided for in Section 6151, is that the judge shall "hear any electors of the district as to the question of the petitioners being qualified electors in such residence district, or any other matter which may be brought before such mayor or judge for determination relating to the sufficiency of such petition."

The judge had exactly the same evidence that the petitioners (except in so far as testimony was taken on the hearing or admissions made as to some of these signers, that they were resident electors of the district), as he had that any one protesting or opposing the granting of the prayer of the petition was an elector of the district. A qualified elector of the district had a right under Section 6151 to present evidence on the question of whether those signing the petition were electors, and, acting under this, the judge heard such witnesses as were protesting, Max Sternlicht and other objectors. Their right to be heard

depended upon their being electors. Sternlicht had filed an objection denominated by him an answer, in which he claimed this right to be heard, because he said he was an elector in the district. He was heard. The evidence offered by him was received, because *prima facie*, filing this so-called answer, he was the one who had a right to be heard. It would hardly be claimed on the part of anybody that the judge would have been justified, in the absence of any suggestion on the part of anybody that Sternlicht was not an elector, to have refused to have heard the evidence that he offered. We think that the practical workings of this statute, if it is to have any value either to those desiring to prohibit or those who are opposed to the prohibiting of the sale of intoxicating liquors within a proposed district, would be so hampered as to substantially take away all the good which it was the design of the Legislature to give, if the petitioners, whether on a petition for prohibition or on a petition against prohibition, were to be required to produce evidence of the qualification of the signers as electors other than such evidence as is furnished by the petition itself, except in answer to evidence which might be produced against their qualifications as electors; and we think this is clearly shown by the section last referred to.

As pointed out by Judge Foran in his opinion in this case, and by Judge Martin in the case referred to in Montgomery county, the time to be taken in these hearings would be such as to make it practically of no use to file any such petitions.

We are of opinion, therefore, that there is no error apparent upon the record in this case which would justify a reversal, and the judgment is affirmed.

**PROCEEDINGS FOR SATISFACTION OF A JUDGMENT
OBTAINED ON CROSS-PETITION.**

Circuit Court for Lucas County.

SAMUEL C. SWIGERD ET AL V. FRED W. DECK.

Decided, March 23, 1912.

Appeal from a Magistrate—Effect of Failure of Plaintiff to File a Petition—Finding by a Court Equivalent to a Personal Judgment, When—Homestead.

1. Where the only thing sought by a cross-petitioner is a personal judgment, and the court finds the allegations of the cross-petition to be true and determines that the defendant should recover from the plaintiff a specified sum on his cross-petition with interest and costs, the entry will be construed to be a personal judgment.
2. It is the duty of a plaintiff whose case has been appealed from a justice of the peace to file a petition setting forth his claim, and where he fails so to do and permits final judgment to be entered upon the claim set forth in the cross-petition, it is too late for the plaintiff to set up his claim in an action thereafter brought to enforce payment of the judgment entered upon the cross-petition.
3. The claim can not be maintained that property which it is sought to subject to payment of a debt is a family homestead, where it appears that the debtor and his family have not occupied the property for three or four years and during a portion of that time a contract was in existence wherein they agreed to sell the premises.

Kohn, Northup & Morgan, for plaintiffs in error.

Eugene Rheinfrank, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the Court of Common Pleas of Lucas County.

In the court of common pleas, Fred W. Deck sued for the purpose of enforcing the payment of a judgment rendered in his favor in that court against Samuel S. Swigerd, the object of the action being to compel the sale of a house and lot and the adjustment of liens thereon.

The answer of Samuel S. Swigerd denied the allegation of the petition that Deck had obtained a judgment against him and set up by way of cross-petition a claim against Deck. The case

was tried to the court and resulted in a finding and decree in favor of Deck, and to that finding and judgment this proceeding in error is prosecuted.

It appears from the record that Swigerd had sued Deck before a justice of the peace upon an account, and that Deck had filed a claim by way of set-off which, on trial to a jury in the justice court, resulted in a verdict in favor of Swigerd for a small sum. Deck appealed from the judgment rendered in the justice's court, the transcript and papers being filed and the case docketed in common pleas court on March 11, 1908. Swigerd filed no petition in the court of common pleas and upon May 21, 1909, Deck filed, no leave of court first being granted so to do, a cross-petition setting up the claim which he had theretofore filed before the justice of the peace. No pleading was filed by Swigerd and the case was submitted to the court of common pleas and a judgment rendered by default in favor of Deck and against Swigerd on June 14, 1909; the journal entry reciting that the same was heard upon evidence.

The first contention of the plaintiff in error in this case is that the finding of the court, as entered in the court of common pleas, is not in fact a judgment. The entire entry, omitting the title of the case, is as follows:

"This day this cause coming on to be heard upon the cross-petition of the defendant, Fred W. Deck, and the evidence, and the plaintiff being in default for answer or appearance, the court does find that the allegations of said cross-petition are true and the defendant should recover from the plaintiff thereon the sum of \$161.67 together with interest from the first day of this term of court and costs."

It is insisted that the court only found the amount which the plaintiff should recover, and did not, in fact, enter judgment upon such finding. Authorities are cited which hold under language somewhat similar to that of the above finding, that the language did not amount to a judgment, but they were cases in which equitable relief was demanded by way of foreclosure of mortgage or otherwise, and that fact aided in construing the language used, and would in such cases justify a conclusion that the only effect was to make a finding of the amount which should

1914.]

Lucas County.

be a lien upon the premises. In this case, however, nothing was sought in the pleadings except a personal judgment, and the court clearly finds the allegations of the cross-petition to be true, and determines that the defendant should recover from the plaintiff, the amount of \$161.67. We hold in this kind of a case the language amounts to the rendition of a judgment.

It is further urged by counsel for plaintiff in error that the court of common pleas erred in rejecting evidence. Under the statutes of this state, it was the duty of Swigerd, when his case, which had been tried before a justice of the peace, was appealed, to file a petition setting forth his claim. Having omitted to do so and having allowed final judgment to be entered upon the claim set forth in the cross-petition of Deck, it was too late to set up his claim in the action thereafter brought by Deck to enforce the collection of the judgment rendered in his favor, and we therefore find no error in the rulings of the court of common pleas in the rejection of evidence relating to such claim.

The premises sought to be subjected were claimed by Maude Swigerd, the wife of Samuel S. Swigerd, as a family homestead. The evidence showed that she and her husband had not lived upon the property for some three or four years, and that there had been, during a portion of that time, a contract in existence by which they agreed to sell the premises, and that the premises were worth the sum of \$1,650.

We think the court of common pleas was justified in finding that the homestead had not been abandoned for a temporary purpose, and that she was not entitled to hold the same as a homestead. The property being of the value stated, it would seem apparent that, in any event, Deck would be entitled to an order for the sale of the premises, and that the mortgage lien should be satisfied therefrom in order that it might be ascertained whether a balance would be left applicable to the payment of this judgment.

Finding no prejudicial error, the judgment of the court of common pleas will be affirmed.

**WORKMAN IN EXPOSED POSITION INJURED BY MOVEMENT
OF ELEVATOR.**

Circuit Court of Cuyahoga County.

THE CLEVELAND PROVISION CO. v. EDWIN C. HAGUE.

Decided, January 22, 1912.

*Contributory Negligence—Choice of Two Ways of Doing a Thing—
Owner of Elevator Chargeable with Knowledge of Operator—Com-
petency of Exhibits.*

1. The rule that where there are two ways of doing a thing, one safe and the other unsafe, he who undertakes to do the thing must choose the safe way, or choose the unsafe way at his peril, does not require that more than ordinary care shall be used in the selection.
2. When one working for an independent contractor in repairing wires about an elevator has requested the operator of the elevator to notify him each time before the elevator is moved, which he has promised to do, it is for the jury to say whether the workman was negligent in relying upon such notice being given him.
3. When the operator in charge of an elevator, whose duty it is to run the elevator for the defendant in the conduct of its business, has notice that a workman for an independent contractor making repairs near the elevator is likely to put himself in position where the operation of the elevator without warning will injure him, and that such danger will be avoided by giving him notice before the elevator is moved, the knowledge of the elevator operator is the knowledge of the defendant.
4. An exhibit is not necessarily incompetent because it fails to show some exact thing in connection with the subject under investigation provided it shows some matter directly bearing upon the matter under investigation, with an explanation of how it differs from that which is being investigated.

Kline, Tolles & Morley, for plaintiff in error.

Cook, McGowan & Foote, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

The relation of the parties here is in the reverse order from what it was in the court below. The terms plaintiff and defendant used in this opinion refer to the parties as they were in the original case.

1914.]

Cuyahoga County.

Plaintiff brought suit against the defendant, which is a corporation, claiming to recover for injuries received by him while working at the plant of the defendant in the city of Cleveland, on the 16th day of June, 1910. At that date the defendant was having the electric wires in its plant changed so that the wires should pass through a conduit, that is, that they should be covered instead of exposed. This work of covering the wires was first undertaken by the defendant itself, but later it entered into a contract with the Martien Electric Company whereby that company undertook to complete the alterations to be made in connection with this wiring system.

The plaintiff was in the employ of the Martien Electric Company, at his work, at the time of the injury. At the time of the injury his work was upon a platform some ten feet above the upper floor of this building, high up toward the ceiling. On this platform there was some moving machinery connected with the working of the plant. One of the moving parts of such machinery was a horizontal shaft so connected with the elevator as that, as the elevator platform moved up or down, this shaft revolved the one way or the other. This shaft was some little distance above the platform, but not so high but that a man could step across it without resting himself upon it; that is, it lacked some inches from being as high as the length of plaintiff's legs. When this shaft was at rest there was, of course, no danger in stepping over it; when in motion, it was dangerous to step over it, because of its proximity to the person of him who stepped over it. There were, besides this, certain pulleys and chains working over them, which would of course be dangerous for one coming in contact with them. The plaintiff was entirely familiar with the situation on this platform. The defendant also was familiar with the situation, and the defendant knew that the work required of the plaintiff, or of those doing the work for the Martien Company in arranging this conduit system for the wires, would require him to be on this platform more or less.

This platform was reached by a stepladder standing upon the floor under the platform and reaching to one of its corners.

This ladder could have been placed at some other part of the platform, that is, it was not necessary that it should be at the particular point where it was placed. On the day of the injury the plaintiff, while working upon this platform, had occasion to get some tools, to reach which it was necessary for him to go upon the floor beneath. He was at work at such point on the platform as that to reach the stepladder he must pass over the elevator shaft. The elevator was operated by an employee of the defendant, and he knew that the plaintiff was at work upon this platform. There is evidence on the part of the plaintiff tending to show that shortly before the accident he was seen upon the platform by the chief engineer of the defendant, or by its superintendent, or both.

On the part of the plaintiff it is claimed, and the evidence shows, that the plaintiff notified the elevator man that he was going onto this platform to work, and that he would be in danger if the elevator should be moved up or down without notice being given to him that the elevator was about to move, and that therefore he must be notified before the elevator should be moved either way, causing this shaft to revolve.

It should be said that the defendant, in the operation of its plant, needed the elevator to be moved at frequent intervals. Of course the suspension of all use of the elevator and of the moving machinery above this platform would have taken away all danger incident to the moving of such machinery; but this was not necessary, nor was it asked for by anybody. The danger to the plaintiff consisted in the moving of this machinery, including the shaft, at a time when the proximity of the plaintiff to such moving shaft or machinery was such that he was liable to be caught by it, and this could easily be avoided if the plaintiff could know in advance just when this machinery was to move, and so far as this shaft is concerned, to know in advance just when the shaft was to move.

The result of the suit was a verdict and judgment in favor of the plaintiff.

On the part of the defendant it is claimed that from the facts disclosed, which are substantially as hereinbefore stated,

1914.]

Cuyahoga County.

the court should have granted a motion which was made both at the close of the plaintiff's evidence and at the close of all the evidence, that a verdict be directed for the defendant, and that the court erred in refusing to grant such a motion. One of the grounds for this claim is, that it is clear, as a matter of law, that the plaintiff contributed to his injury by his own negligence. This claim is not well founded. It is urged in support of it that if the plaintiff had placed the stepladder, or caused it to be placed, at another part of the platform, he could have reached it to go to the floor below without stepping over this shaft; that therefore there was a safe way by which he might have reached the tools which it was necessary for him to have without stepping over the elevator shaft, and the rule that where there are two ways of accomplishing a thing that needs to be done, the one a safe way and the other unsafe, he who undertakes to perform the thing must choose the safe way, or choose the unsafe at his peril. This rule does not require that one shall exercise more than ordinary care in making such selection, and this particular case would not require that the ladder must be placed at a point where it would have afforded a safe place for the plaintiff to have avoided the particular accident which came to him, provided, taking the whole situation into consideration, he placed the ladder where a man of ordinary prudence would have placed it.

It must be remembered that there was no danger in stepping over this shaft provided it should remain still during the whole time of stepping over it. It was entirely safe when the plaintiff started to step over it. He was injured because it started while he was stepping over it, because it then caught him and threw him in such wise that his foot caught so as to be crushed at one of the pulleys over which a chain moved. It was a question properly for the jury to determine whether the plaintiff exercised such care as the ordinarily prudent man would have exercised in such a circumstance, and we are not prepared to say that the jury found wrong on that question.

It is urged further that the plaintiff was negligent in not notifying the man in charge of the elevator that he was about

to step over this shaft, because, it is said, knowing as he did that if the shaft revolved while he was stepping over it, he would be placed in a dangerous position. In considering this it must be remembered that the situation was not dangerous when he attempted to step over it, provided the conditions remained until he had completed the stepping over as they were at the time he began to step over; that he had notified the elevator man to warn him when he started the shaft, because his work would be such that he was liable to be in danger when the shaft started, unless he had an opportunity to protect himself. We think it was a question fairly submitted to the jury whether it was *per se* negligence for the plaintiff to rely upon receiving the notice, and so this position is not sound.

On the part of the defense it is shown by the man in charge of the elevator himself that at all times prior to the happening of this accident, whenever the plaintiff was working upon this platform, notice was given to him before the shaft was set in motion, and it is testified to by him, the elevator man, that on this occasion he gave notice before he started the shaft. Upon this proposition the evidence is conflicting. But it is urged that whether this be true or not, that is, whether it be true or not that the plaintiff arranged with the elevator man that he should be notified whenever the elevator was to start, that it was negligence on the part of the plaintiff to trust to any such arrangement made with the elevator man, because, it is said, the latter went beyond the scope of his employment when he took upon himself to give notice to the plaintiff of when he would start the elevator. In support of this claim our attention is called to the case of *Hall, Headington & Co. v. Edwin L. Poole*, 50 Atlantic, 704 (94 Md., 171). This case will be discussed later in this opinion, together with others cited on this proposition, contenting ourselves here with saying that we hold that the man in charge of the elevator, whose duty it was to run the elevator for the defendant in the conduct of its business, was so far the agent of the defendant as that, he having notice of the dangerous position in which the plaintiff was likely to put himself, and having notice that such danger would be avoided

1914.]

Cuyahoga County.

by his notifying the plaintiff when he would move the elevator and so put the shaft in motion, his knowledge of the arrangement was the knowledge of the defendant.

It is further urged on the part of the plaintiff in error that the court erred in receiving the verdict and entering judgment upon it in the absence of answers by the court, and which they failed to answer. Those questions were:

First. "Was the operation of the elevator while the plaintiff was at work upon the elevator platform, inherently dangerous to plaintiff during the entire time he was so engaged?"

To this the jury responded. "Can not answer."

Suppose the jury had answered this either way, we are unable to see that the general verdict would necessarily have been affected by that. The general verdict might well have been reached if the answer had been "Yes," and so it might well have been reached if the answer had been "No."

This applied equally to the second question, which reads:

"Was the operation of the elevator while the plaintiff was at work on the platform dangerous at intervals only?"

To this the same answer was made, but we think an answer either way would not have been inconsistent with the general verdict.

The jury responded to each of the several interrogatories in the same words, "Can not answer." The other questions are:

Third. "Was the operation of the elevator while the plaintiff was at work upon the elevator platform dangerous only when he was passing to and from the work upon said platform?"

Fourth. "Was the operation of the machinery while the plaintiff was at work upon the elevator platform dangerous only when he passed over the drum shaft in going to and from the work?"

Fifth. "Could the plaintiff have gone to and from the work upon the platform with safety to himself by means of a ladder placed against the front of the platform?"

Sixth. "Was there any safer way for the plaintiff to go to and from the work on the elevator platform than that of passing over the drum shaft?"

If what has already been said in this opinion in reference to the matter of the different means by which one may go from one place to another, and the responsibility as to taking a safer course, is sound, then an answer either way to any one of these questions would not necessarily have resulted in a different verdict, notwithstanding the proposition that in choosing between a safe and a dangerous way to do a thing, other things being equal, he who takes the dangerous way does it at his own peril; because the circumstances surrounding the taking the one way or the other must always be taken into consideration in determining whether ordinary care is used in the choice of the path taken. This seems to be a sufficient answer to the claim that the case should be reversed because of this failure to answer interrogatories. However, it may be said that no objections were taken at the time. True, counsel were not present when the verdict was returned, but it seems to be settled by the authorities that in order to avail oneself of such failure, there must have been exception taken or objection taken at the time. See *Mutual Accident Association v. Harrington*, 10 C.C.(N.S.), 134; 20 *Enc. Pleading & Practice*, 352. However, we do not here determine that the rule applies where the party or attorney is not present.

It is further urged that the court erred in admitting certain offered evidence over the objection of the defendant.

The first of these objections is shown by the record at page 75, where this question was asked of the plaintiff by his own counsel: "Mr. Hague, was it necessary to shut the elevator down for you to do your work up there?" It is said this is asking for a conclusion, and this is true in a sense, but the admission of the answer to this question was not prejudicial to the defendant, especially when the answer to that question is taken into consideration. The answer was: "It was not." And this is equally true of another question appearing on the same page of the record: "When did it become necessary to stop the operation of the elevator?" The answer was: "Why it only became necessary when we were crossing or pulling the wires, going to and from." There was no prejudice in this.

1914.]

Cuyahoga County.

It clearly conveyed to the jury only a proposition which was so thoroughly shown by all the evidence that the only danger to which the plaintiff was subjected by the moving of the elevator shaft was the danger that he might be caught when he was required to cross over it, if it were then in motion.

On page 83 of the record, the plaintiff offered in evidence a cut or picture of a pulley with a chain over it; before this was offered in evidence it was handed to the witness, and this question was asked of him: "I hand you a little cut showing a couple of sprocket wheels and chain, and ask you whether in a general way that represents the chain in which you were caught and the wheels around which it revolves?" To which the answer was: "It does, except it was about half the width." Q. "That is, a half that width chain would represent the chain in question here?" A. "Yes, sir; that is the shape of the gear exactly." Thereupon the cut was offered and appears in the record as "Exhibit A."

The objection is that it is not a cut of the exact wheel, but the answers to the questions put show in what the plaintiff says it differs from the exact wheel. We see no reason why this might not be a proper item of evidence as giving to the jury information from which they might well learn more than they would without such cut.

The "Exhibit B," also, which was offered in evidence was offered and admitted under objection. This was shown by the witness to represent a chain similar to the one shown in "Exhibit A," somewhat enlarged. An exhibit is not necessarily incompetent because it fails to show some exact thing in connection with the subject under investigation, provided it shows some matter directly bearing upon the matter under investigation with an explanation of how it differs from that which is being investigated. Suppose that one is injured by some mechanical device eight inches in diameter; there is offered in evidence a device which is testified to as being exactly like the one under investigation except that it is double the size of the one being investigated, but it is offered to show the workings of the device. Or, suppose a cut of some device which is being investigated if

offered, which is not of the exact size of the device itself but is larger or smaller, but shows the construction or operation of the device; or, suppose that a device under investigation is so similar to a device produced by another manufacturer as that the operation or construction of the one under investigation may be shown by the similar devices, the witness explaining that the difference is, it can not be that the exhibit must be excluded. First, a witness testifies that the device is similar, but points out in what respect it differs; then, surely, with the opportunity for cross-examination to show whether it is all similar, or if dissimilar, to what extent, the court would not be justified in refusing to admit the exhibit. We find no error in the rulings upon the admission to evidence.

But it is said that the court erred in its charge to the jury, and that it erred in refusing to charge certain propositions requested by the defendant. It should be said in reference to these requests that they were not made in such wise as to bring them under the statute as to requests made to be given before argument, nor is it claimed here that they were so requested. So that, if the charge as given was a proper charge, and if on the subjects covered by the requests the court properly charged the jury, then there was no error in refusing to give the requests in the form in which they were presented to the court. It is said that there was error in the charge first because of the following language:

“Briefly stated, the plaintiff says that he was injured through the negligent act of the defendant in failing to notify him or warn him of the starting of said elevator, and of the setting of said machinery connected therewith in motion, while knowing that plaintiff was on said platform in the performance of his duty.”

And again this language:

“So that the issue directly made by the petition and the answer was as to the fact of the warning. The defendant admits the agreement to warn, and says the fact was that on this particular occasion it did warn. That is the issue as made up by the pleadings.”

1914.]

Cuyahoga County.

There is this to be said about the language of the judge here last quoted: The defendant did not admit the agreement to warn, but substantially it does admit that the plaintiff had notified the man in charge of the elevator that he should give him warning when he would start the elevator. If the defendant had knowledge, through its proper agent, that the plaintiff would be in danger when the shaft moved, and that the plaintiff would depend upon warning coming to him when the shaft was to be moved, the obligation to give such warning would have been no greater because the elevator man had promised that he would give him warning, and so the statement by the court as to the admission was immaterial.

It is further complained that the court erred in using this language in its charge:

“If you find that the elevator boy was entrusted by the defendant with the control and operation of the elevator for any purpose, then under such facts the boy became the agent of the company.”

Taken in connection with the remainder of the charge, there was no error in this. If the boy controlled the operation of the elevator, then he was the agent of the company, in the operation of that elevator, and the “for any purpose” can only have affected the matter of the charge when taken in connection with the evidence as to whether the boy did have the control of the operation of that elevator. Of course this meant, and was understood by the jury to mean, that this boy or man, if he had such control of the elevator, that he determined when it was to be moved and when it was not to be moved, and what warning was to be given, if any, to one who might be in danger by reason of its being moved, then he was the agent of the company for that purpose. And so we consider that charge the right one.

In this connection the following authorities should be considered:

Earlier in this opinion the case of *Hall, Headington & Co. v. Poole*, 50 Atlantic, 704 (94 Md., 171), is mentioned, with the statement that it would be discussed later. In that case the

plaintiff was in the employ of a contractor, who had to put in the electric wiring for a business plant. He found it convenient, though not necessary in the performance of his work, to get into the elevator shaft at its foot. By so doing he put himself in a position in which he was sure to be injured if the elevator should be used in the ordinary way, running clear down to the bottom of the shaft. He told the elevator boy that he was going into this place of danger; he told him not to run the elevator down below the first floor while he was there at work. And he testified that the boy said: "All right." Aside from the knowledge of this boy there was no knowledge on the part of anyone connected with the defendant that the plaintiff was in this dangerous position. What the boy undertook to do was to omit doing all that his duty required of him, namely, to stop the elevator at the first floor when coming down, whereas his duty required of him to run clear down to the foot of the shaft.

The court held that when the boy undertook to omit the performance of the duty required of him by the terms of his employment, he went beyond the scope of such employment, and could not thereby bind his principal.

The present case is easily distinguishable from that. In that case it was sought to hold the principal for a promise of his servant that he would omit the performance of a duty which his employment required of him to perform. In this case no suggestion was made that any duty should be omitted, but only that warning should be given of when he would perform one of his duties in the running of the elevator. We think it might well be that one should not be held to be acting within the scope of his employment when he assumed to omit to perform such duty, and still be within the scope of his employment when he undertook to perform the duty in a particular way, which would in nowise interfere with the performance of his full duty to his employer.

The case of *Farmers & Mechanics National Bank v. Hanks*, 128 S. W., 147, is very nearly akin to the present case. We quote from the syllabus:

1914.]

Cuyahoga County.

"A passenger elevator-man who knew before descending that a workman was in the shaft in a position where he was liable to be injured, if not notified, was legally bound to use ordinary care not to injure him, independent of any agreement as to notifying him of his descent, and he was, under the circumstances, the agent of the owner of the building, and being intrusted with the control and operation of the car by such owner, was the latter's agent."

In the case of *Reatty v. Metropolitan Building Co.*, 115 Pacific, 90, it is held that where a workman went into an elevator shaft, telling the elevator boy not to come below a certain floor with his elevator, and the boy promised not to do so, the elevator boy was not acting outside the scope of his employment.

In this case the court considered a large number of cases on the question of the agency of the elevator man, among them the case of *Hall, Headington & Co. v. Poole*, *supra*, and reaches the conclusion as above stated, citing in support of the view taken by the court the following: *Soderstrom v. Patten*, 131 Ill. App., 32; *Bank v. Hanks*, *supra*, and *Donovan v. Gay*, 97 Mo., 440.

The requests to charge made by the defendant to be given were seventeen in number. Of these nine were given and eight refused. The first one refused is the one numbered 7 and reads:

"The duty of determining whether or not it was safe for the plaintiff to work on the platform over the elevator shaft was upon the plaintiff and not upon the defendant."

The giving of this request could not have aided the jury more than it was aided in determining the rights of the parties by the charge given.

The claim of the plaintiff is not based on the proposition that it was necessarily dangerous to work on the platform over the elevator shaft, but that it was dangerous when the machinery was in operation, and so the refusal to give this did not prejudice the defendant.

The court gave, at the request of the defendant the eighth proposition requested:

"The defendant in this case did not owe the plaintiff the duty of providing a safe place for him to work."

That was a sufficient instruction as to whose duty it was to determine whether the place was safe or not. The claim of the plaintiff was not based upon the obligation which would be due from the defendant to him if the plaintiff had been an employee of the defendant, and the court distinctly told the jury that the obligation of the defendant to the plaintiff was to exercise ordinary care for his protection.

As bearing upon whether there was any prejudice to the defendant in the refusal to give the seventh proposition requested, the ninth proposition requested, which was given, may be considered, and this reads:

“Even though you may find that it was unsafe to work upon the elevator platform while the elevator machinery was in operation, you can not on this account conclude that the defendant was guilty of negligence; neither is there any presumption to the effect, if the plaintiff was injured, that the defendant was guilty of negligence.”

The eleventh, which was refused, reads:

“If you find that it was in fact unsafe for the plaintiff to work on the elevator platform while the elevator machinery was in operation, then, I charge you, that it was the duty of the plaintiff, when in the course of his work it became necessary for him to go upon said platform, to notify the defendant, and thus afford the defendant an opportunity to discontinue the operation of said car until the plaintiff had completed his work upon the platform.”

Clearly this ought not to have been given. There was no claim made that the car should not be operated while the plaintiff was at work upon the platform, but only that it should not be put in motion without a warning to him.

Without stopping to read each one of these requests refused, we reach the conclusion that in view of the charge as given, there was no prejudice to the defendant in the refusal to give such as were refused. Attention has not been called specifically to each one of the errors complained of, but attention has been given to all of them, and attention in this opinion is called to those which we regard as of as large importance as any, and

1914.]

Lucas County.

on the whole record we fail to find that there was any error to the prejudice of the defendant whereby substantial justice was not done to it in this trial, and the judgment is affirmed.

VALIDITY OF A MODIFIED CITY CONTRACT.

Circuit Court of Lucas County.

JOHN H. LLOYD, A TAX-PAYER, ON BEHALF OF THE CITY OF
TOLEDO, v. CITY OF TOLEDO ET AL.*

Decided, January 27, 1912.

Municipal Corporations—Contracts for Public Improvements—May be Modified Without Action by Council—Discretion and Good Faith With Reference to Modifications—Failure of Record to Show Approval of Modified Contract—Sections 4211 and 4331.

1. The statute requiring that action taken by the proper officials modifying an existing municipal contract shall be made a matter of record is directory only, and such action regularly taken is not nullified by failure through an oversight to make a record thereof.
2. Nor does failure by the city council to specifically authorize a modification by ordinance render such a modification invalid since a municipal improvement which has been duly authorized by council and the necessary appropriation made, is left by the municipal code to the proper board or officer to be carried to completion.
3. The record fails to disclose bad faith or any abuse of discretion in the modification by the officials in charge of the construction of a bridge over the Maumee river at Cherry street, Toledo.
4. Where an appropriation for a specific municipal improvement has been made and funds provided by a sale of bonds to pay for the entire cost of such improvement, and thereafter a new contract is entered into modifying some of the terms of the original contract, the failure of the city auditor to certify that the money was in the treasury to the credit of the fund from which it is to be drawn does not render the modified contract invalid and this is true for an additional reason when the modifying contract imposes no increased liability upon the city.

*Dismissed in the Supreme Court for want of preparation.

C. A. Sciders and Frank H. Geer, for plaintiff in error.

Cornell Schreiber, City Solicitor, and *A. G. Duer*, for city of Toledo.

E. B. King, for the C. H. Fath & Son Construction Company.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Appeal from the Court of Common Pleas of Lucas County.

The plaintiff brings this action as a tax-payer of the city of Toledo against the city, its officials, and the C. H. Fath & Son Construction Company, for the purpose of enjoining the construction of a bridge over the Maumee river at Cherry street, under the modifying contract of August 9, 1911, and to enforce its construction under the original contract of March 3, 1910, at the compensation claimed by the plaintiff to be provided therein, and for such further relief as he may be entitled to in equity.

The case has been submitted to us upon the evidence which was introduced in the court of common pleas and a large amount of additional evidence taken before a referee in this court, all of which we have carefully read. The questions at issue and the amount involved have been such as to command the most thorough consideration of counsel and of this court, and in our deliberation we have been greatly aided by the able arguments, both oral and typewritten, of counsel.

It appears from the evidence that the city provided the funds, amounting to \$825,000, by the sale of bonds, and having taken the preliminary steps entered into the original contract with the C. H. Fath & Son Construction Company on March 3, 1910, for the construction of a reinforced concrete arch bridge to be built under the directions of engineers appointed by the city. Upon the execution of the original contract the work was commenced by the C. H. Fath & Son Construction Company and has been proceeded with to the present time. On August 9, 1911, a supplementary or modifying contract was entered into between said company and the city through the director of public service, the purpose of which was to modify the original method of construction in various respects.

The original plan contemplated that, by means of cofferdams which could be pumped out, the foundations of the piers should

1914.]

Lucas County.

be built in the dry, but in working on pier No. 6 water was encountered which appears to have seriously interfered with pursuing the work under that plan. The method adopted in the original plan was found by the city, on the advice of the consulting engineer, to be not feasible nor safe, especially for piers three and four, which adjoin the channel of the river where the head of water is strongest. By the original contract it was intended to use throughout most of the wells for laying the foundations, wooden lagging supported by iron rings, but the modified contract specifies steel cylinders in lieu thereof. The original contract, however, authorizes the use of shields, metal rings or steel cylinders under certain circumstances, when recommended by the engineers. The use of steel cylinders for the purpose intended is, of course, much more expensive than wooden lagging and iron rings, but the new contract provides for the removal from the work of the steel shields except the lower 24 feet 9 inches, and requires a credit to the city of four cents per pound, while the original contract failed to provide for any credit therefor. The modifying contract also provides for a layer of concrete called a blanket over the entire surface of the cofferdams six to ten feet thick, to be laid under water by means of a tremie pipe or other suitable method, and it further substitutes in certain places timber piles in place of concrete piles. In addition to the items already mentioned, the new contract requires the C. H. Fath & Son Construction Company to provide a compressed air plant and the city agrees to purchase the same at \$6,000, if it should require its use, and to pay the net cost of its operation not exceeding \$25 per day. The modifying contract extends the time for the completion of the bridge for a period of six months beyond the original contract.

The plaintiff contends that the modifying contract of August 9, 1911, is illegal and void for various reasons, and he asks to have it so adjudged by decree of this court.

The first ground of his contention to which we direct attention is based upon the claim that the city council did not authorize the contract and that it was not approved by the board of control, there being no record of such action by that board. Parol

evidence has been received, however, which establishes beyond all question that at a meeting of the board of control the modifying contract was duly approved by a unanimous vote. The secretary was not present at that meeting. The director of public service informed him soon after the meeting of the action taken by the board, for the purpose of having it recorded, but it was overlooked and no record ever made. In the light of this parol evidence, the charge contained in the petition that the director of public service, John R. Cowell, and the city solicitor, Cornell Schreiber, entered into and approved the contract without the authority of the board of control wholly fails. The statute requires a record of such action to be made, but we have no doubt that the statute is directory only, and the mere oversight of the clerk or secretary in failing to make a record of action duly taken by the board, can not nullify that action nor invalidate the contract based thereon. The general rule sustaining that doctrine is laid down in Volume 2, Dillon on Municipal Corporations, 5th Edition, Sections 557 and 558, being Sections 300 and 301 of the 4th Edition of that treatise. Such was the holding in *Drott v. Village of Riverside*, 2 C. D., 565, and in many other cases, and the rule appears to be founded on excellent reasons. Dillon's Treatise on Municipal Corporations has been a well recognized standard authority for a generation, and the author in the sections cited uses the following language:

"Where the records of a municipal corporation have been so carelessly and imperfectly kept as not to show the adoption of a resolution or other acts of the city council, and there is no written evidence in existence, parol testimony may be admitted, *e. g.*, to show that certain work was done by authority of the city, by proving the passage of a resolution of the council, the appointment of a committee to make the expenditure, their report after the work was done, and its adoption by the council."

That the contract was not specifically authorized by ordinance passed by the city council is not, in and of itself, sufficient to render it invalid. The municipal code contemplates that the city council shall, in inaugurating an improvement, give authority and make the necessary appropriation and shall take no further action, but that the business shall be conducted to com-

pletion by the board or officer having charge of the same. Section 4331 of the General Code vests in the director of public service power to make alterations and modifications upon approval of the board of control.

We have no doubt of the power of a municipal corporation to change or modify, with the consent of the other contracting party, contracts into which it has entered. Upon this proposition we cite *Weston v. Syracuse*, 158 N. Y., 274; *Meech v. Buffalo*, 29 N. Y., 198; *Doland v. Clark, Mayor*, 143 Cal., 176; 2 *Dillon Municipal Corporations*, Section 820.

Such being the power and authority of the board of control and the director of public service, we are brought to the claim made by plaintiff that the modifying contract was entered into through fraud and bad faith and was an abuse of discretion on the part of that board and the director of public service. If the modifying contract is shown to be a result of fraud or bad faith, or if its execution was an abuse of the discretion vested in the city officials, then a tax-payer suing on behalf of the city, is, of course, entitled to the fullest relief from a court of equity. The charges made have required of the court a careful reading of the entire record covering some five hundred pages of testimony, and in addition thereto numerous exhibits.

It is not within the province of this court to determine whether the bridge should or could be built in accordance with the original plans, nor whether those plans ought to be modified to meet conditions encountered during the progress of the work, nor in what respects the plans should be modified, if at all. Those matters are all confided by the statutes of Ohio to the sound discretion of the city authorities. For a court to interfere and determine those questions would be to transcend its powers and usurp the functions of the board of control and director of public service.

The duty is cast upon this court of determining whether the board of control in authorizing the modifying contract, and the director of public service in entering into the same on behalf of the city, exceeded their powers under the law, and whether the said officials abused the discretion vested in them when they authorized and entered into the said contract.

We are unanimously of the opinion, after the most careful examination of the entire record, that the charges of fraud and bad faith and abuse of discretion are not sustained by the evidence, either as to the modifications provided or the extension of time for the completion of the bridge. We think the evidence shows that the city officers having this work in charge have acted in good faith, and, as was well stated by Judge Chittenden in the court of common pleas in his decision of the case, courts have ever hesitated to arrogate to themselves the right to be the censor or guardian of public officers who act in good faith.

The difficulties which had been encountered and the delays which had ensued under the original plans and the necessity of avoiding them in the future, as far as may be possible, consistent with approved methods, appear to have all been carefully considered by the director of public service and the board of control for weeks before the final execution of the contract of August 9, 1911. In some particulars there was a sharp conflict among the engineers in charge, notably with reference to the quality of concrete laid under water, and the wisdom of the change in the kind of piles to be used. These were engineering questions calling for the opinion of experts in the construction of foundations for bridges, and were properly referred to the consulting engineer, Ralph Modjeski. He gave the matter his personal attention and recommended the modified contract.

These questions so submitted and determined were in no sense judicial questions, but called for the exercise of sound business judgment and the highest grade of mechanical skill in engineering. This court is convinced, from the evidence, of Mr. Modjeski's thorough qualifications as an expert of national reputation in the construction of bridges, and he occupies the unique position in this case of being commended for his capacity and experience by every witness who has been called on for information whether testifying for the plaintiff or the defendants, and nothing in the records tends to impeach his integrity. Mr. Modjeski unhesitatingly gives his opinion that the modified plan is a wise one and should be followed.

1914.]

Lucas County.

Mr. Gessner, who is the severest critic of the new plan, is careful to state his position in his testimony taken before the referee in the following language:

"I do not attempt in any of my answers to say that the bridge is unsafe under the modified construction, and I do not want to be so understood."

One of the allegations of fraud or bad faith contained in the petition consisted of the charge that K. F. Gill, an officer of the construction company, unduly used his influence as a friend of the mayor to bring about the execution of the supplementary contract. I mention this charge thus specifically for the purpose of directing attention to the fact that at no stage of the case has the plaintiff offered or attempted to offer any evidence to sustain the same, and I wish to express our disapproval of the practice of making reckless charges of bad faith in the pleadings not based on any evidence, for we assume that if the plaintiff had evidence to support the charge it would have been produced.

Before determining whether objections made by the plaintiff to the validity of the modifying contract are tenable, it is necessary that the court should construe the original contract and specifications with a view of ascertaining whether any of the so-called changes are within the terms and provisions of the first contract. It is contended by counsel for the C. H. Fath & Son Construction Company that all of the changes could have been properly made under the order and direction of the engineer pursuant to the terms of the original specifications and contract, and without any necessity for a new one. Paragraph 28 of the original specifications, which is a part of the contract, provides as follows:

"28. Furnishing and placing metal lining for cylinder shafts. (See Section 13). This work will include all of the metal required for these shields, or metal linings, in case they are required. The engineers will decide whether or not these metal linings are necessary and will also furnish designs for same, or in case designs are submitted by the contractor, they shall be subject to the approval of the engineers."

Article III of the original contract contains the following provision:

“Art. III. It is understood and agreed by and between the parties hereto, that the work included in this contract is to be done under the direction of the engineers, who will represent the owners on the work, and *that their decision as to the true construction and meaning of the drawings and specifications shall be final.*”

The specifications contemplated the use of *some* metal shields or linings, and we hold, in view of the wide discretion given to the engineers by the terms of the contract that the power is vested in them to decide whether they were necessary and if in the progress of the work it became in the opinion of the engineers necessary that they should be used, then it might be properly done within the provisions of the original contract; and we see no reason why, if in their opinion it became necessary to do so, these steel cylinders might not be covered with a concrete blanket constructed under water, and all within the original contract, nor do we discover any reason why the metal, shields, linings or cylinders might not properly, in the same broad discretion confided to the engineers, be provided with a cutting edge and weighted with concrete in the manner which, as appears from the evidence, was subsequently adopted.

Courts will within reasonable limits give heed to the interpretations which the parties themselves have placed on their contracts, and it is in evidence that the parties to the first contract did interpret the same in such a manner as to evince their understanding that it authorized the use of steel cylinders for this purpose, for it appears from the evidence that the contractor, with the approval of the engineers, did on June 22, 1911, long before the execution of the modifying contract, purchase steel cylinders for use under the contract of March 3, 1910.

It is worthy of note that the price for metal shields under the original contract was seven cents per pound with no rebate, and that under the supplementary contract the city receives a rebate of four cents per pound for all steel not left permanently in the

1914.]

Lucas County.

wells. Mr. Gessner, who is called by the plaintiff, testifies that if the metal cylinders properly come under item 28 of the original contract, then the bridge if built under the modifying contract will cost approximately \$48,000 less than under the original contract.

It is manifest that, with the construction we place upon the contract of March 3, 1910, the provision for the rebate of four cents per pound inserted in the contract of August 9, 1911, will inure very largely to the benefit of the city.

Bearing this construction of the contracts in mind, we approach the next contention of plaintiff, that the modifying contract is invalid because the city auditor did not certify that the money was in the treasury to the credit of the fund from which it is to be drawn. We do not understand that such a certificate is required where the fund is provided by the sale of bonds for a specific purpose (*Emmert v. Elyria*, 74 O. S., 185; *Akron v. Dobson*, 81 O. S., 66; *Kohler Brick Co. v. Toledo*, 10 C.C.[N.S.], 137). Furthermore, as we construe these two contracts, the later one does not cast any increased obligation upon the city.

It is also insisted that the director of public service was without legal power to enter into the modifying contract, because it exceeds the sum of \$500 and should have been let to the lowest bidder after advertising for bids. We believe and hold that this objection is valid to the extent that the contract contemplates the purchase of a compressed air plant at \$6,000, and provides a rental for use of the same, but beyond that the objection is without force.

As already indicated, the new contract aside from its provisions relative to the compressed air plant does not increase the liability of the city. Even if it did so, it can not be that a contract providing for such alterations and modifications is required to be let to the lowest bidder after advertising. Such a course, if it resulted in a contract with a different person than the one holding the main contract, would introduce inextricable confusion and would almost certainly result in vexatious delays and expensive litigation. Such a course was held not to be necessary in *Hastings v. Columbus*, 42 O. S., 585 and 594; *Burke*

v. *Cleveland*, 6 N.P.(N.S.), 225 (affirmed without report, 75 O. S., 603).

The contract of August 9, 1911, provides that the steel shields from the rock upwards are to be of a permanent character, 24 feet 9 inches long, and above that point are to be so constructed that they can be removed and used again. It appears from the evidence that steel shields to the length of 36 feet 9 inches are left in some of the wells and have been paid for. The parties to the new contract having agreed on 24 feet 9 inches as the length to be left in the wells, no authority exists, so long as they continue to operate under the same, to pay for more than that and for the use at three cents per pound for such additional length as may be placed in the wells temporarily.

The record in this case contains evidence taken since the case was appealed to this court, tending to show that to construct the bridge under the modifying contract will, after making all rebates for steel removed, cost the city \$900,000. The evidence further tends to show that if the bridge were constructed under the original contract and included the steel cylinders now being used, and allowed no rebate for steel removed, it would cost approximately \$48,000 more.

It must be remembered that the bridge is being built on the unit plan, the specifications and contract so providing, and that therefore the precise total cost is not known, because it is not known just how many pounds of steel, cement, etc., will be required. These were, however, approximated in the estimates claimed to have been made by the engineers for the city. The original estimates, said in evidence to have been made by them under the first contract, were \$813,000. The fund provided by the sale of bonds amounted to \$825,000, being the total sum appropriated for such work and is the limit beyond which the board of control and the director of public service may not go in the performance of these contracts. It was said by the Supreme Court in *Village of Carthage v. Dickmeier*, 79 O. S., 323, 345, in a case where the village clerk's certificate was required to be filed because numerous contracts were made for separate improvements to be paid from a gross fund, that it was not within the power of the council to increase the liability of a municipal

1914.]

Lucas County.

corporation beyond the amount for which the certificate had been filed. The court states that to so hold would strike down the statute. In like manner in the case at bar where no certificate is required, because a single fund raised by a bond issue is appropriated to a single public work and the limitation is the fund so appropriated, to go beyond that fund would be to disregard the general policy of the state as embodied in the statutes providing the restrictions under which municipal improvements may be made. It is manifest that the amount certified to be in the treasury to the credit of the fund can never exceed the total amount appropriated for the work, and that the requirement to keep within the amount so certified contemplates that the amount appropriated shall not be exceeded. See General Code, Section 4211; *Akron v. Dobson*, 81 O. S., 66, 78.

The contracts under review provide for a work of great magnitude for which the city has already appropriated \$825,000 and upon which more than \$200,000 has already been expended. The construction under the supplementary contract has proceeded for more than five months along the lines and in pursuance of the modifying plans adopted by the city on the advice of the consulting engineer. To stop the work by order of court or to require a return to the original method at this time would produce great confusion and would probably be calamitous in its consequences. To justify a court of equity in entering such a decree, it should be clearly and unequivocally required by the circumstances of the case.

It follows from what has been said that the injunction must be denied except as to the compressed air plant, and for the steel left in the wells in excess of 24 feet 9 inches, and that the total expenditures under the two contracts shall not exceed the amount appropriated therefor.

It must be understood that nothing contained in the foregoing decision is intended to express any opinion as to the power of the city council with reference to further appropriations for the completion of the bridge, if occasion therefor should arise.

**AUTHORITY OF AN AGENT EMPLOYED TO NEGOTIATE
AN EXCHANGE OF PROPERTY.**

Circuit Court of Cuyahoga County.

ANNA M. POTTER V. LEON A. POTTER AND HENRY VEELMAN.

Decided, January 22, 1912.

Agency—Authority of Agent—Estoppel.

1. An agent authorized to make an exchange of properties, is not authorized to accept a deed conveying property accepted in exchange for his principal's property to any one else than his principal.
2. An estoppel from statements made does not arise in favor of one who had no knowledge of the statements at the time he acted.

Tanney & Barber, for plaintiff.

William Gordon and *H. Neff*, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

The plaintiff, in her petition, sets out that she is the owner of certain real estate described therein, and that she became such owner on the 5th day of June, 1907. She says she is the owner of this property, and she relates a certain transaction which will be hereafter mentioned as showing how it comes that Henry Veelman claims any interest in the described premises. She says that by reason of certain facts named in her petition, Veelman claims to be the owner of the premises. The defendant Leon A. Potter is the husband of Anna M. Potter.

Veelman denies the allegations of the petition, and sets up in his cross-petition that he is the owner of the premises and prays to have a decree entered that the premises belong to him.

The facts are that the premises described were purchased by Anna M. Potter and her husband, Leon A. Potter, the deed for the same was placed in Susan M. Conian, the mother of the plaintiff. She held the property in trust for Anna and her husband. On the 5th day of June, 1907, by arrangement between Susan M. Conian and the plaintiff and her husband Leon

1914.]

Cuyahoga County.

A. Potter, the said Susan M. Conian executed a warranty deed of said premises to the plaintiff, and delivered such deed to her. There was a suggestion on the trial that this deed was never delivered by Mrs. Conian to Anna M. Potter, but the evidence shows that before the present suit was begun, Anna M. Potter had this deed with her, and carried it to the office of L. Z. Tanney, attorney at law at this bar, and an attorney in this case. Subsequently, and without the knowledge of said plaintiff, her name as grantee in this deed was erased and the name of one Benjamin R. Blase substituted therefor.

This deed to Anna M. Potter had never been recorded; nevertheless, it being in the possession of Anna M. Potter, the legal title in the premises was thereby in her. There being, however, no record of this fact, the legal title appeared by the record to stand in her grantor, Susan M. Conian, until the deed which had been made to Anna M. Potter and was altered so as to make it appear that Blase was the grantee, was recorded. That deed being recorded, the record of deeds of the county would make it appear that the legal title of this property was in Blase.

Veelman owned a piece of real estate in Ashtabula county, Ohio, which he was desirous of exchanging for property in Cleveland, as this property claimed by the plaintiff was. Negotiations took place between Veelman and Leon A. Potter and Blase by which it was agreed between them that the Ashtabula county property owned by Veelman should be exchanged for the property here claimed by the plaintiff. Veelman went to the house of the Potters, that being the house on the premises involved in this litigation, and the plaintiff learned that these negotiations were going on. She had no intimation at this time that the title did not stand in her; no intimation had come to her of this change of the deed, which change was made fraudulently by somebody, probably by her husband and Blase. Nothing in the evidence indicates that the plaintiff had any idea that an exchange was to be made, except that the Ashtabula property was to be conveyed to her in exchange for her city property; nor had she any idea that the contract would be completed until she should have executed a deed conveying the city property to Veelman.

Veelman understood that it was the plaintiff's property, but before the exchange was completed by the delivery of deeds from one party to the other he found that the title apparently was in Blase, and so he accepted a deed from Blase of this city property, and he conveyed by deed to Blase the Ashtabula county property. Mrs. Potter never vacated the premises which she here claims. In short, by the acts of Leon A. Potter and Blase both the plaintiff and the defendant Veelman were deceived and defrauded.

It is urged on the part of Veelman that the plaintiff held out to him that her husband was her agent for this exchange, and that whatever was done by her husband was to be held as having been done by her. The evidence is such as to justify the conclusion that she did understand that her husband would examine the Ashtabula property and determine whether it was best to make the exchange, but there was nothing that could suggest that she was to accept as consideration for the deed of the city property a deed of the Ashtabula property made to Blase.

It is further claimed on behalf of Veelman that Mrs. Potter is estopped from claiming that she was the owner, equitable or otherwise, of this city property, because of testimony given by her in bankruptcy proceedings in which her husband was adjudged a bankrupt. In that proceeding she seems to have testified that neither she nor her husband had any property (this deed of the property in controversy was in the name of her mother), but Veelman knew nothing of this testimony. He did not rely on it. As against him she is not estopped from making claim that she owned the property, as she clearly did own it, except as is hereafter to be stated.

The evidence shows that \$400 of the purchase money for this property, which was originally conveyed to Susan M. Conian, was furnished by Leon A. Potter, and therefore the title held by Susan M. Conian in trust was to the extent of \$400 held in trust for Leon A. Potter, and Leon A. Potter is the man who negotiated with Veelman and under whose direction Veelman conveyed his property to Blase. Whatever rights, therefore,

1914.]

Cuyahoga County.

Leon A. Potter had in this property is the property of Veelman, because Veelman has paid for the entire property, and he must have so much of it as belonged to the man to whom or for whom he made the payment, to-wit: Leon A. Potter. Besides this, Veelman has paid certain taxes on the property, and has paid interest upon a note secured by mortgage on this property, and to the extent of such payments, he is entitled to be protected.

The decree of the court here will be practically what it was below, that is, that the title of the plaintiff in the premises is quieted as against the defendant Henry Veelman, subject to the lien of \$400 which was the interest of Leon A. Potter in the premises; the taxes paid by Veelman, the amount paid by Veelman on the mortgage indebtedness, with interest on the sums so paid from the first day of June, 1911; and if such liens of Veelman shall be paid on or before the first day of March, 1912, plaintiff's title will be perfected as against Veelman. The rights of the mortgagees can be determined and fixed, as there is no dispute about those rights.

**RAILWAY COMPANIES OWNING LEASED LINES NOT LIABLE
FOR THE WILLIS LAW TAX.**

Circuit Court for Cuyahoga County.

**THE CLEVELAND & PITTSBURGH RAILROAD COMPANY V. STATE
OF OHIO.***

Decided, December 24, 1913.

Taxation—Application of the Excise Tax Provisions to Railway Companies Whose Lines are being Operated Under Lease—Construction of the Willis Law—Sections 5485 et seq.

A steam railroad corporation which has leased its entire line and equipment and is not operating within the state of Ohio, is not required to pay an assessment under the Willis law upon its issued and outstanding capital stock.

*Motion for order to direct the Court of Appeals to certify its record overruled by the Supreme Court, March 24, 1914, because "it does not appear from the record that error has probably intervened."

Squire, Sanders & Dempsey, W. O. Henderson and Lawrence Maxwell, for plaintiff in error.

T. S. Hogan, C. D. Laylin and Robert M. Morgan, contra.

WINCH, J.; MEALS, J., and GRANT, J., concur.

This is an action to reverse a judgment for \$85,203.40 recovered by the state against the railroad company for delinquent excise taxes found to be due under the Willis law, so-called, for the years 1902 to 1908, inclusive, being an assessment amounting to one-tenth of one per cent. upon the issued and outstanding capital stock of the railroad company for said years. The railroad company claims the judgment is not authorized by law.

There is no dispute as to the facts of the case, and though the literature of the case is voluminous, it will not be greatly extended by this opinion, for all that is really involved in the case is the true intent and meaning of a statute which seems plain enough upon its face for him who runs to read and understand.

Previous to 1871 the Cleveland & Pittsburgh Railroad Company was a steam railroad corporation duly incorporated under the laws of Ohio and owning and operating a railroad within the state. It was also incorporated under the laws of Pennsylvania and owned and operated a railroad in that state, connected with its Ohio line.

October 25, 1871, the Cleveland & Pittsburgh Railroad Company leased all its property to the Pennsylvania Railroad Company and surrendered possession of all its railroad and all property and equipment connected therewith to the Pennsylvania Railroad Company, the former company retaining its corporate existence, however, for the purpose of collecting its rent under the lease and distributing the same as dividends to its stockholders, with an agreement to pay for extensions, renewals, betterments and increased facilities for its railroad properties, the latter company to operate the road and pay all taxes lawfully assessed against it.

April 14, 1873, all rights under this lease were assigned to the Pennsylvania Company, which has ever since been in possession of the property, operating the same and paying all taxes assessed on the real and personal property of the lessor company.

1914.]

Cuyahoga County.

April 11, 1902, the original Willis act (95 O. L., 124), was passed and Sections 1, 2 and 7 thereof require consideration in this case, as well as Section 7 of the act as amended April 25, 1904 (97 O. L., 381).

These two acts cover the period for which taxes were claimed by the state; there have been amendments to these statutes passed since 1908.

By the first section of the act of 1902, every corporation organized under the laws of this state, for profit, is required to make a report in writing to the Secretary of State, annually, setting forth certain facts, including the nature and kind of business in which the company is engaged and its place or places of business, and to pay a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of the corporation.

By the second section of this act, every foreign corporation for profit doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to certain requirements of other laws, is required to make a report of certain facts to the Secretary of State, annually, and to pay an annual fee, for the purpose of exercising its franchises in Ohio, of one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio.

Ever since the passage of this act the Pennsylvania Company has made reports to the Auditor of State and has paid an excise tax upon the gross earnings from the operation of the Cleveland & Pittsburgh Railroad within the state of Ohio, as required by the second and fifth sections of the act of March 19, 1896 (92 O. L., 79), sometimes called the Cole act, and the amendments thereof. The Cleveland & Pittsburgh Railroad Company has never filed the annual reports nor paid the taxes required by either the Willis law or the Cole law, claiming that it was not required to do so, because it was not "engaged in business" within the intendment of said laws, and in the claim that it was not required to file annual reports with the Auditor of State, the state has acquiesced and still acquiesces. With the merits of this claim we are not now concerned, as will develop from further

consideration of the case, but an assumption that this claim is correct is necessary to an understanding of the state's contention regarding the meaning of Section 7 of the act of 1902, to which we now come.

The Legislature having provided by other laws for the payment of excise taxes by certain corporations, Section 7 of the Willis act exempts them from the payment of a franchise tax or fee under its own provisions in the following language (quoting only so much as is applicable to this case):

"Provided that electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, *steam railroad*, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the auditor of state, * * * shall not be subject to the provisions of the preceding sections of this act."

The amendment of 1904 (97 O. L., 381) makes no change in this language except to insert the words "public service," between the words "other" and "corporations" so as to read "other public service corporations" instead of "other corporations."

We apprehend this amendment is not important in a discussion of this case and confine our attention to a consideration of the meaning of the section as originally enacted.

The contention of the state, to quote from the brief of the Attorney-General and his associate counsel is:

"That Section 7 does not except the plaintiff in error company because, though it is chartered as a railroad company corporation, it is not an operating company, and was not required during the years in question to file a report with the auditor of state and pay a tax under the Cole law, so-called; and that the mention of steam railroad in Section 7 means a steam railroad corporation which in addition to owning its property, is also the operator thereof."

It would seem that the Legislature, if it had intended what the law officer of the state now contends for, would have said so. It could have said so by using the following simple language:

1914.]

Cuyahoga County.

“Provided that all corporations (or all public service corporations) required by law to file annual reports with the auditor of state, shall not be subject to the provisions of the preceding sections of this act.”

Instead of using this simple language it enumerated some fifteen kinds of corporations, and then said “and other corporations, required by law to file annual reports with the Auditor of State,” shall not be required to comply with the act.

Clearly the intention was to exempt steam railroad corporations, and the other fourteen mentioned corporations, from the operation of the act, and also to exempt therefrom such other corporations, if any, then existing, or which might thereafter be authorized by law, and which might be required by law to file annual reports with the Auditor of State.

The use of the words “other corporations required,” etc., was to complete the enumeration of exempt corporations and not, as claimed by the state, to limit and qualify the enumeration already made.

At least two good reasons appear for this conclusion: there was then in existence at least one kind of corporation (equipment company) not enumerated, which was required to file annual reports with the Auditor of State, and other like companies might afterwards be authorized by law, in which event Section 7 of the Willis act, with its enumeration of exempt companies, but without the general words, “other companies,” etc., would have to be amended every time such new companies might be authorized.

We think the Legislature meant something by its enumeration of exempt companies in Section 7, and that the courts are not at liberty to disregard this enumeration and rewrite the statute as suggested by the Attorney-General. That is for the Legislature to do and it is significant that the Legislature has not done it, though more than ten years have elapsed and subsequent legislation has wholly revamped the laws upon the subject here involved.

We conclude that the statute is unambiguous and plain, requiring nothing to be added to or taken from its words so that

it may be understood and applied by the taxing officers of the state, and that by its plain terms the Cleveland & Pittsburgh Railroad Company, being a steam railroad corporation, is exempt from the provisions of the Willis act.

This conclusion makes it unnecessary to examine other statutes claimed to be *in pari materia*, or to go beyond the words of Section 7 itself, to determine the *intention* of the Legislature in enacting said section. The section intends what it says.

For the same reason it becomes unnecessary to consider the very interesting question submitted by the railroad company as to the effect of the judgment of the court below, which allowed the claims of the state, resulting, as clearly pointed out in briefs of counsel, in double taxation of one business, for the lessee company pays the Cole tax on the gross business done on this railroad and pays it for the lessor company.

The leasing of railroads by Ohio railroad corporations is favored by our statutes, but to make the giving of such a lease require the payment of additional taxes to the state, would penalize and so prohibit such leasing.

For the reasons stated, because the plain words of the statute require it, the judgment is reversed, and there being no dispute as to the facts of the case, judgment is rendered for the plaintiff in error.

1914.]

Cuyahoga County.

ACTION BY A MINORITY STOCKHOLDER.

Circuit Court of Cuyahoga County.

HARRY KOBLITZ V. THE BROOKSIDE BRICK COMPANY ET AL.

Decided, May 10, 1912.

Corporations—Stockholder Suing for Company—Demand and Refusal of Officers to Bring Suit—Good Faith of Officers.

1. Although generally a stockholder can not bring an action in his own name but for the benefit of the corporation, upon a cause of action existing in favor of the corporation, without alleging and proving demand upon the corporation, or its proper officers to bring the action, and refusal on their part to act, yet where the demand would have to be made upon those who are charged with having committed the wrongs which it is sought to redress and against whom the action would have to be brought, and, under the circumstances, would be a vain thing, its necessity is dispensed with.
2. The highest good faith on the part of an officer and director of a corporation does not require him to finance the company out of his own resources so as to enable it to take advantage of a favorable option.

*Harry Koblitz and Wing, Myler & Turney, for plaintiff.**W. W. Hole, F. C. Scott and Martin W. Sanders, contra.*

NIMAN, J.; POLLOCK, J., and DUSTIN, J. (sitting in places of Judges Winch and Marvin), concur.

The plaintiff in this action is a minority stockholder in the defendant, the Brookside Brick Company, a corporation organized under the laws of Ohio. He brings this action on behalf of himself, and all other stockholders of said company similarly situated, to correct certain alleged abuses in the management of the corporation claimed to have been committed by the majority stockholders in the control of the board of directors, and to secure redress for the corporation on account thereof.

Stated briefly, the facts established by the evidence are as follows:

In 1905 the Brookside Brick Company, a West Virginia corporation, and the predecessor of the defendant, the Brookside Brick Company of Ohio, was the owner of a brick plant near Brookside Park, in the city of Cleveland. Its supply of clay for the making of brick was nearly exhausted and its financial resources were limited.

On September 11, 1905, a regularly called special meeting of the stockholders was held, the minutes of which show that a majority of the issued and outstanding capital stock was represented, and that the following motion was unanimously adopted:

“Moved and seconded that the proposition made by Mr. Louis Koblitz to the B. B. Co., which is as follows, be accepted: Said Louis Koblitz to buy 290 shares treasury stock of said B. B. Co.; said Louis Koblitz is to buy the $10\frac{3}{4}$ acres, more or less, south of and adjoining the plant of the B. B. Co., being the same land upon which H. Spitz, manager of the B. B. Co. received an option from L. M. Plummer, Pittsburgh, Pa., and for which the said H. Spitz agreed to pay \$700 per acre. The aforesaid Louis Koblitz to sell to the B. B. Co., on royalty of ten cents per thousand brick the clay from said land. Said clay to be used for the manufacture of brick. Said royalty to be based on brick sold, delivered and accepted; and the said Louis Koblitz is to give the B. B. Co. the right to take clay from said land for the period of one year, with the privilege of extending said right to take clay at the same price, ten cents per M. brick, for one year longer; and the said Louis Koblitz is to give the said B. B. Co. the right to purchase said land at the same price be paid for same within the time the said B. B. Co. has the right to take clay from said land on royalty.”

The Louis Koblitz mentioned in this section is the Koblitz who is one of the defendants in this action. The capital stock of the West Virginia corporation was 1,000 shares of the par value of \$50 per share. The 290 shares of treasury stock sold to Louis Koblitz under the terms of the foregoing motion were sold at \$20 per share, making a total price of \$5,800.

After this motion was adopted, Louis Koblitz took his stock and paid \$5,800 for it as stipulated; he also bought the $10\frac{3}{4}$ acres of clay land and the company proceeded to take clay there-

1914.]

Cuyahoga County.

from for the manufacture of brick, and paid the royalties provided therefor.

At about the time Louis Koblitz acquired this stock, or a short time before, he also acquired 220 shares from Herman Spitz, giving him 510 shares in all out of a capitalization of 1,000 shares, and vesting him with the power of control in the corporation. He was at once elected to the board of directors and was chosen treasurer of the corporation, and he, and those who may be presumed to be under his control and influence, have been in control ever since.

In May, 1906, the West Virginia corporation was dissolved and the defendant, the Brookside Brick Company, was organized under the laws of Ohio, with the same capital stock. The property and rights of the old company were turned over to the new company, and the liabilities of the old were assumed by the new. Stock in the West Virginia company was exchanged for a like amount in the Ohio company.

The money paid by Louis Koblitz for his treasury stock was paid to the bank to apply on an indebtedness of the company amounting to \$15,200.

The option provided for in the proceedings of the stockholders' meeting of September 11, 1905, covering the 10¾ acres of land, was not exercised by the company, and on October 15, 1907, after the two years provided in the option had expired, a stockholders' meeting was held at which 614 shares were represented. The following resolution was adopted at this meeting:

"WHEREAS, The Brookside Brick Company, holders of an option on a certain tract of land about 10¾ acres adjoining the Brookside Brick Company plant, and known as the Plummer property, from which they have been using clay on a royalty, said option dated September 11, 1905, and expired September 11, 1907; and

"WHEREAS, The Brookside Brick Company being unable to take advantage of said option, instruct the secretary to notify the owner of said tract of land upon which option was held, in writing, of their inability to accept or take advantage of said option."

It appears that at no time during the two years covered by the option was there any money on hand to take advantage of it. September, 1906, a destructive fire occurred which made necessary the rebuilding of a part of the company's plant at an expense of several thousand dollars. In the early part of 1907, the company owed the United Banking Company \$11,000, which was secured by mortgage on the company's plant as well as by a mortgage given the bank by Louis Koblitz on the 10¾ acres covered by the option. The company was also indebted to Louis Koblitz in the sum of \$13,000 which he had loaned it on a second mortgage.

At the same stockholders' meeting at which it was voted to notify Louis Koblitz that the company could not take advantage of the option a resolution was adopted authorizing the making with the owner of the 10¾ acres of a royalty contract for clay, on the basis of twenty-five cents per thousand brick manufactured, sold and delivered, and on the 16th day of December, 1907, such a royalty agreement was made between the company and the defendant, Joseph Koblitz, in whose name the property then stood. The royalties paid under this agreement and extensions thereof on the twenty-five cents per thousand basis, amounted to something over \$11,000.

The company continued in business until February 17, 1912, when its board of directors made an assignment of all its property to the defendant, Lawrence Koblitz, for the benefit of creditors.

Thereafter, the plaintiff in this action filed a motion in the insolvency court to remove the assignee upon grounds similar to the grounds set forth in his petition in support of the relief prayed for by him. This motion on hearing in the insolvency court was overruled.

The plaintiff, by this action, seeks to have the deed of assignment declared null and void and set aside, and a receiver appointed; to have an accounting between the Brookside Brick Company and the other defendants as to the moneys received by such defendants from the company; and to have such relief decreed as will result in a suspension of the two years time

1914.]

Cuyahoga County.

limitation in the option contract so that the company, freed from the alleged antagonistic influences of the defendant Louis Koblitz, may have an opportunity to take advantage of said option.

Some technical objections have been interposed against the right of the plaintiff to maintain this action.

It is urged by the defendants that the questions involved in this action have been adjudicated by the decision of the insolvency court on the motion to remove the assignee, but in our opinion the issues before us are much broader than the issue raised by the motion, and while the motion might be supported or opposed in part by the same evidence that would support or oppose the averments of the petition, yet the matters in issue in the two hearings are entirely different.

It is also contended by the defendants that the plaintiff can not maintain his action as a stockholder without first making demand upon the proper officers of the corporation, or the assignee, to start suit to redress the grievance complained of, and showing a refusal to comply with such demand.

It is the rule generally that a stockholder has no right to bring an action in his own name upon a cause of action existing in favor of the corporation, and in which the corporation is the proper plaintiff, unless the corporation has refused to prosecute the action, and it is therefore necessary for a stockholder who institutes such an action to aver and prove a demand upon the corporation, or its proper officers, to start the action, and a refusal to act. Where the demand, however, would have to be made upon those who are charged with having committed the wrongs which it is sought to redress, and against whom the action would have to be brought, and where a demand under the circumstances would be a vain thing, its necessity is dispensed with. In this case we think the averments of the petition are such as to show a right in the plaintiff to institute the action without having first made a demand upon the officers or assignee.

Coming to the decision of the case, then, upon its merits, we think the entire controversy depends upon the disposition to be

made of the plaintiff's contention that the company's rights under the option should not be concluded merely because the two years have passed, but that it should be placed in such a position as that, freed from the control of Louis Koblitz, it may have an opportunity to still avail itself of said option.

Without this $10\frac{3}{4}$ acres of land, the company is hopelessly insolvent, and the deed of assignment should stand. If the right to acquire this supply of clay by taking advantage of the option still belongs to the company, the value of its assets will be much greater, and if the value of this land is as great as it is asserted to be, the company would not be insolvent.

It is claimed that Louis Koblitz, being in absolute control of the company through the ownership of a majority of its stock, caused its affairs to be so managed that the company refrained from acquiring the supply of clay necessary for its further existence, and intentionally allowed the option to expire, so that he might cause the company to fail, and the intimation is that he acted with a view of ultimately acquiring the plant after the failure of the company at a small portion of its value, and using it in connection with his valuable supply of clay. It is urged that his failure to have the company exercise the option has operated as a fraud on the corporation and on other stockholders.

It is said in *Thompson on Corporations*, Vol. 2, Section 1216:

"A director occupies a position of trust or agency for his corporation of such a character that dealings between him and it, where his interest is opposed to that of the corporation, will be subject to close scrutiny and will not be sustained as against the stockholders, unless consistent with good faith and fair dealings on his part."

Giving the conduct of Louis Koblitz in connection with this option that close scrutiny required by the law, we are compelled to reach the conclusion that his dealings with the company are entirely consistent with good faith and fair dealings on his part.

At the time he was induced to become a stockholder and invest his money, the company was in poor financial condition. It

1914.]

Cuyahoga County.

received much financial assistance from him from time to time. In fact, it appears from the evidence, that whenever the company was in need of money, he was the one to whom appeal was made. He mortgaged the $10\frac{3}{4}$ acres of land in question and otherwise pledged his credit for the benefit of the company. At no time during the two years provided for in the option did the company have the means at hand to acquire the land, unless the money should be advanced or in some way secured by Koblitz himself. The rule of highest good faith could hardly require him to finance the company out of his own resources to enable it to take advantage of the option. Complaint is made that money was expended in rebuilding the plant after the fire that might have been used to acquire the land, but the money so used was borrowed for that purpose, and we fail to see how any implication of bad faith is suggested by the act of the company, under the control of Koblitz, in borrowing money for one purpose and not borrowing it for another.

All of the important transactions complained of here were considered and authorized at stockholders' meetings, at which a majority of the stock was represented. The option expired September 11, 1907, and the meeting at which it was resolved to notify the owner of the land of the company's inability to accept said option, was held October 15, 1907. For more than four years after this the company continued in business, and was supported financially by Louis Koblitz until the assignment was made. We are unable to see how more could be required of him as a matter of right and law.

The transaction with respect to the making of the new royalty contract with Joseph Koblitz on the basis of twenty-five cents per thousand brick, does not seem to have been unfair. The price was the usual price for clay. The company has used the clay paid for by it and has had the benefit of it. There is nothing in this transaction to call for an accounting.

In view of the conclusions reached by us on the facts as indicated, the relief sought by the plaintiff and the various cross-petitioners will be denied, and the petition and cross-petition dismissed.

**APPLICATION OF THE DEFENSE OF NEGLIGENCE OF
FELLOW SERVANT.**

Circuit Court of Cuyahoga County.

**GUISPPE RUGGIERE v. THE NEWBURGH & SOUTH SHORE
RAILWAY COMPANY.**

Decided, May 10, 1912.

*Master and Servant—Negligence—Fellow-Servant Defense—Not Abro-
gated in all Cases by Sections 6242 and 6244, General Code.*

Where one employee of a railroad company who is assisting another employee of the same grade, his fellow-servant, in replacing old ties with new, is struck a blow on the nose and injured by a mallet carelessly swung by such fellow-servant, the defense of fellow-servant may be made by the railroad company in an action brought against it by the injured employee, notwithstanding the provisions of Sections 6242 and 6244, General Code.

B. D. Nicola, for plaintiff in error.

Squire, Sanders & Dempsey, contra.

NIMAN, J.; POLLOCK, J., and DUSTIN, J. (sitting in place of Judges Winch and Marvin), concur.

This was an action brought by the plaintiff in error in the court of common pleas to recover damages for personal injuries suffered by him while in the employ of the defendant in error.

At the conclusion of the plaintiff's case in the court below, the trial court, on motion of the defendant, directed a verdict in favor of said defendant.

Proper steps were taken by the plaintiff to preserve for reviewing the ruling of the court on the defendant's motion to direct a verdict, and the question presented by this proceeding in error is whether or not the trial court erred in so directing a verdict for the defendant.

The evidence tends to establish the following state of facts:

On the 17th or 18th day of July, 1910, the plaintiff was in the employ of the defendant, and was engaged with others in

1914.]

Cuyahoga County.

repairing certain railroad tracks by removing old wooden ties and replacing them with steel ties. A short time before the accident to the plaintiff occurred, the foreman in charge had directed the plaintiff and three others to go to a certain part of the tracks and proceed with the work of replacing the old ties with the new. After reaching the place designated the men started on their work. The plaintiff and another man, by the name of Melano, worked together on this occasion. Melano used what is termed a "spiking mallet" to drive the steel ties into position while the plaintiff held and placed in the proper place the bolts which fastened the rails to the ties. While the plaintiff was in a stooping position near the end of a tie waiting for Melano to drive it into place so that the bolts could be put through, the spiking mallet, swung by Melano, glanced off the tie or missed it, and struck the plaintiff on the nose, inflicting serious injuries.

It appears, therefore, that Melano was the fellow-servant of the plaintiff and the defendant can not be held liable for the injuries suffered by the plaintiff, unless the relation between Melano and the plaintiff, and the liability of the defendant, have been so modified by Section 6242, P. & A. General Code, or 6244, P. & A. General Code, as to deprive the defendant of the defense of negligence of a fellow-servant.

Section 6242 is as follows:

"That in all actions brought to recover from an employer for personal injuries suffered by his employee or for death resulting to such employee from such personal injuries, while in the employ of such employer, arising from the negligence of such employer or any of such employer's officers, agents, or employees, it shall be held in addition to the liability now existing by law that any person in the employ of such employer, in any way having power or authority in directing or controlling any other employee of such employer, is not the fellow-servant, but superior to such other employee; any person in the employ of such employer in any way having charge or control of employees in any separate branch or department, shall be held to be the superior and not fellow-servant of all employees in any other branch or department in which they are employed; any person in the employ of such employer whose duty it is to repair or in-

spect the ways, works, boats, wharves, plant, machinery, appliances or tools, in any way connected with or in any way used in the business of the employer or to receive, give or transmit any signal, instruction, or warning to or for such employees shall be held to be the superior and not fellow-servant to such other employees of such employer."

The evidence discloses no power or authority in any way in Melano to direct or control the plaintiff in the work in which they were both engaged, nor does the evidence bring the case within the other terms of this section. Melano was not a person whose duty it was to inspect or repair the ways, works and other things enumerated in the statute under consideration, or do the other things therein mentioned in such sense as to become the superior to the plaintiff.

The remaining question, therefore, to be decided is whether Section 6244 deprives the defendant, under the facts shown, of the defense of fellow-servant.

Section 6244 provides:

"That in all such actions the negligence of a fellow-servant of the employee shall not be a defense where the injury or death was in any way caused or contributed to by any of the following causes, to-wit: Any defect or unsafe condition in the ways, works, boats, wharves, plant, machinery, appliances or tools, except simple tools, in any way connected with or in any way used in the business of the employer; the negligence of any person engaged as a superintendent, manager, foreman, inspector, repairman, signal man, or any person in any way having charge or control of such ways, works, boats, wharves, plant, machinery, appliances or tools; the negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the negligence of any person to whose orders the employee was bound to conform, and by reason of his having conformed thereto the injuries or death resulted; the negligent act of any fellow-servant done in obedience to the immediate or peremptory instructions or orders given by the employer, or any person who has authority to direct the doing of said act; the want of necessary and sufficient rules and regulations for the government of such employees and the operation and maintenance of such ways, works, boats, wharves, plant, machinery, appliances or tools."

1914.]

Cuyahoga County.

It is contended that, on behalf of the plaintiff, Melano was a repairman, because he was engaged at the time of the accident in repairing the track of the defendant, and that since his negligence caused or contributed to the injury of the plaintiff, the defense that the plaintiff was injured by the negligence of a fellow-servant, is not available to the defendant.

We think this contention is not well founded. In our opinion the word "repairman" is used in the statute to designate or describe one who makes repairs, or who is charged with the duty of making repairs upon machinery, tools, appliances or other property of the employer, used by another employee, or other employees in the work done for the employer. The evident purpose of including the term "repairman" in the statute was to protect the employees against the negligence of those who repair the instruments by which such employees perform the duties of their employment, and the places in which they labor. This protection is furnished by depriving the employer of the defense of negligence of a fellow-servant when the negligence of an employee who repairs, or whose duty it is to repair tools, machinery, appliances, or other property of the employer used by another employee, in any way causes or contributes to the injury or death of the latter.

In this case the employee whose negligence caused, or contributed to, the injury of the plaintiff was not a repairman in the sense indicated, and the trial court committed no error in directing a verdict for the defendant at the conclusion of the plaintiff's case.

Although other errors were assigned by the petition in error, nothing in support thereof has been brought to our attention and the judgment of the court of common pleas is affirmed.

**SALE OF UNISSUED STOCK TO DIRECTOR ON TERMS UNFAIR
TO THE COMPANY.**

Circuit Court of Cuyahoga County.

OWEN W. CALLAHAN V. THE OWEN STEEL CRANE COMPANY ET AL.

Decided, May, 1912.

Corporations—Sale of Unissued Capital Stock—Fraud.

A sale of unissued treasury stock to one of the directors at par on a cash payment of 25% and a promise to pay the balance in ten annual payments, no efforts being shown to sell the stock to others, but cash offers therefor having been received and refused, additional capital not being necessary and the stock being probably worth more than par, because it was then paying 20% dividends, will be set aside as a fraud upon the corporation and its stockholders.

Max P. Goodman, for plaintiff in error.

Wing, Myler, & Turney, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

The plaintiff in this case seeks to have a sale and issue of fifty shares of stock of the Crane Company, to the defendant J. Frank Rollings, set aside and held for naught, on the ground that the transaction was illegal and fraudulent.

It appears that the corporation was organized in May, 1910, with an authorized capital stock of \$25,000, divided into 250 shares of one hundred dollars each. Two hundred shares of stock were issued to plaintiff in payment for the good will of his steel crane business and certain applications for patents on cranes, which he transferred to the company.

Callahan sold eighty of his shares to the defendants Rollings and Eagan, and their wives, retaining one hundred and twenty shares for himself. When he made this sale to Rollings and Eagan, he entered into a written agreement with them that they should have the control of the corporation and a majority of the board of directors, and that the fifty shares of unissued or treas-

1914.]

Cuyahoga County.

ury stock should be issued to a trustee for the joint benefit of the three parties. Pursuant to this agreement the corporation elected Rollings and his wife and Eagan and his wife as four of the five directors of the company, and Callahan as the fifth director.

The corporation had no plant or physical assets when it started business; it was a mere selling agency, soliciting orders for cranes which it filled by having cranes manufactured for it by others.

The company met with some success in the next few months. In January, 1911, it had an annual meeting and re-elected the same directors under whom it continued business until the latter part of 1911. Meanwhile it had paid 20% dividends to its stockholders, and accumulated \$3,000 or \$4,000 of profits in addition. Then trouble arose and Callahan demanded that the original tripartite agreement for the control of the company be rescinded; Eagan and Rollings demurred and issued the fifty shares of treasury stock, without consideration, to the wife of one of them as trustee. Then Callahan brought suit to have this issue of stock rescinded, and while the suit was pending, by mutual consent, said tripartite written agreement was rescinded and annulled; the stock was returned to the company and the case was dismissed.

Thereupon Callahan notified the other four directors that he stood ready to purchase said fifty shares of stock and pay par for them, and a meeting being called at once, he appeared at the meeting, demanded at least his pro rata share of said stock, thirty shares, and offered to pay therefor in cash. The directors refused his offer and at once, by a vote of Eagan, his wife and Rollings's wife, accepted an offer of Rollings to take the fifty shares and pay therefor \$100 cash and the balance in annual payments of \$500 each. Rollings himself did not vote on this proposition, and offered no security for the deferred payments. The evidence fails to show that he is good for the amount of his agreement.

At once Callahan brought this suit to set aside said sale of fifty shares to Rollings, the case being removed here by appeal

and heard on the evidence. It is apparent that this controversy is simply over the right of control of the corporation.

The defendants justify their actions in the premises on two grounds: first, that Callahan induced them to buy their stock from him on an agreement that they should have control of the corporation, and second, that the directors had full discretion to sell the stock to anybody to whom they desired to sell it.

The first point is easily disposed of on the evidence. Whatever agreements were made between the parties for control of the corporation were reduced to writing and merged in that writing; the written agreement was thereafter, by mutual consent, terminated. That voluntary action of the parties in the midst of litigation must be considered as a settlement of the whole matter, so far as an agreement for control of the corporation was concerned, and put an end to all moral obligation on Callahan's part to further live up to his agreement. It is doubtful if the agreement ever had any legal force.

As to the right of the directors to dispose of this unissued fifty shares of stock as they did, it has two aspects, their legal right to distribute the stock as they saw fit, and their good faith in selling it to one of their number on credit, rejecting at the same time the plaintiff's cash offer therefor.

Whatever the law applicable to the facts in this case may be, as decided in other states and laid down by the text writers, it is plainly expressed in this state by the syllabus of the case of *Simms v. Street Railroad Co.*, 37 O. S., 556, as follows:

"By the Revised Statutes, Section 3248, the powers, business and property of a corporation having a capital stock, must be exercised, conducted and controlled by its board of directors, who are duly elected and qualified; and a court of equity will not, on the application of a stockholder, interfere with its management and control of the corporate business, while acting within the scope of its authority, unless they are guilty of a breach of trust to the injury of such stockholder.

"This principle is applicable to the action of the board of directors, in receiving subscriptions for that portion of the authorized capital not taken before the corporation was organized, where it will promote the objects of the corporation. A subscription for such stock made by one member of the board,

1914.]

Cuyahoga County.

with the consent of the others, and payment of the par value thereof, when the transaction is free from fraud, and is beneficial to the corporation, will not be set aside at the instance of a stockholder, when no action has been taken to withhold such stock from subscription or sale."

We think weight must be given to the phrases: "where it will promote the objects of the corporation" and "when the transaction is free from fraud, and is beneficial to the corporation."

In the Simms case it affirmatively appeared that the sale of unissued stock to Tom L. Johnson was beneficial to the corporation and was free from fraud.

"Repeated efforts had been made by the board to place this stock, but with little success.

"The financial condition of the company was such that additional capital was necessary.

"From the allegations of the petition it (the stock) was worth much less" (than par).

"The consideration received was for the full value of said stock. The property and money received was necessary and proper for the use of the company. In short, the transaction was bona fide and beneficial to the company."

What are the facts in the case at bar?

Not only were no efforts made to sell the stock to others, but cash offers therefor from Callahan and his sons were refused. The financial condition of the company was such that additional capital was not necessary.

From the evidence it is likely the stock was then worth more than par; at least it was paying 20% dividends, which is probably the reason the opposing factions have got into this scramble for it.

No good consideration was received for the stock; a cash payment of 2% and a promise to pay the balance in ten years was for the benefit of director Rollings, who received the stock, and not for the benefit of the corporation. In short, the transaction was not *bona fide* and was not beneficial to the company in any aspect of it, and only beneficial to Rollings and his faction, the other directors who voted the stock to him.

We are unable to say, as required by the *Simms* case that the transaction in question is free from fraud and beneficial to the company. It appears to have been such an abuse of the trust reposed in the board as warrants the interference of the chancellor.

Judgment for plaintiff.

**EQUITABLE INTEREST UNDER A LAND CONTRACT NOT
SUBJECT TO A JUDGMENT LIEN.**

Circuit Court of Cuyahoga County.

THE WESTERN RESERVE NATIONAL BANK V. MARY E.

CHRISTY ET AL.

Decided, May 22, 1912.

Exemption in Lieu of Homestead—Judgment Lien—Equitable Interest in Land.

1. Where real estate in which a judgment debtor has an interest under a land contract is, by agreement of all parties, sold and converted into money in a suit to marshal liens on the property, such liens to be transferred to the fund realized from its sale, the judgment debtor's interest in said fund as exemptions is \$500, notwithstanding he occupied the premises as his homestead.
2. A judgment is not a lien upon the judgment debtor's equitable interest in real estate under a land contract for its purchase and possession by him.

White, Johnson & Cannon, for plaintiff.

Ford, Snyder & Tilden, W. A. Granger, Myers & Green and M. B. & H. H. Johnson, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

This action is here on appeal. The pleadings and agreed statement of facts on which the case was submitted, disclose that on the 9th day of June, 1911, an involuntary petition in bankruptcy was filed against the defendant, Henry C. Christy, in the United States District Court for the Northern District of Ohio,

1914.]

Cuyahoga County.

Eastern Division, and thereafter he was duly adjudicated a bankrupt; that the defendant, J. C. Logue, is the duly elected and qualified and acting trustee of the estate of the said Henry C. Christy in bankruptcy; that the defendant, the First National Bank of Cortland, Ohio, on the 7th day of July, 1910, recovered a judgment against the said Henry C. Christy in the Court of Common Pleas of Cuyahoga county, on which there remains unpaid the sum of \$2,880, with interest from the date of the judgment; that on the 22d day of August, 1910, another judgment for \$3,420.63 was rendered in said court in favor of said bank and against said Christy, which, with interest from the date of rendition, is wholly unpaid and in full force and effect; that on the 6th day of March, 1911, an execution was issued on said judgments to the sheriff of Cuyahoga county, who on the 7th day of March, 1911, levied said execution upon the interest of Henry C. Christy in the property described in the cross-petition of the defendant, the First National Bank of Cortland; that prior to the year 1910, Henry C. Christy acquired from Julia Flynn, by assignment, a land contract with Lizzie H. Neff for the purchase of land described in the cross-petition of the defendant, the First National Bank of Cortland, by which said property was to be purchased by Christy for \$14,500; that at the time the judgments against Henry C. Christy were rendered in favor of the First National Bank of Cortland, there had been paid on said land contract the sum of \$6,500, leaving a balance due on the purchase price of \$8,000 and interest; that at all of the times mentioned the said Henry C. Christy and his wife, occupied the dwelling house on the premises embraced in said land contract as their home, and were in full possession of said premises under the land contract, the legal title thereto at all times remaining in Lizzie H. Neff; that while this action was pending in the court of common pleas, the property covered by said land contract and described in the cross-petition of the defendant, the First National Bank of Cortland, was by agreement of all parties to the action, sold for the sum of \$12,000 out of which the sum of \$9,333.57 was paid to satisfy the claim of Lizzie H. Neff for the balance of the pur-

chase price of the premises, with interest, \$500 to the said Henry C. Christy to apply on his claim for exemptions, and \$299.77 for taxes and other expenses, and the balance, \$1,866.73, to J. C. Logue, trustee of the estate of Henry C. Christy in bankruptcy, to be held by him subject to the final determination of the issues in this action; that by said agreement this fund is substituted for the property sold, and the rights of the parties to this action are transferred to said fund without in any way prejudicing the respective claims of the parties to said agreement.

By the terms of the agreement referred to all the parties to the action, except the First National Bank of Cortland, J. C. Logue, trustee of the estate of Henry C. Christy in bankruptcy, Henry C. Christy and Mary E. Christy, abandoned their claims against the property involved in the action and the fund derived therefrom, and on the hearing in this court counsel for Mary E. Christy urged no claim on her behalf.

The conflicting claims against the fund which has been substituted for the real estate, therefore, are those of the defendants, the First National Bank of Cortland, J. C. Logue, trustee, and Henry C. Christy.

The First National Bank of Cortland claims the entire fund on the ground that it acquired a lien against the interest of Henry C. Christy in the real estate described in its cross-petition, and being that from which the fund was realized, by virtue of its judgments.

J. C. Logue, trustee in bankruptcy of the estate of Henry C. Christy, claims the entire fund as a part of the general estate of the bankrupt, unincumbered by any claims or liens.

Henry C. Christy claims the sum of \$500 out of said fund on the ground that he is a resident of the state of Ohio, and the head and support of a family, and that the premises from which the fund was realized were occupied by him as a homestead, and that he is entitled to receive in lieu thereof upon said sale in the manner indicated, the sum of \$1,000 as homestead exemptions, of which \$500 has already been received.

Considering the last mentioned claim first, Section 11730, General Code is cited, by virtue of which husband and wife

1914.]

Cuyahoga County.

living together, may hold exempt from sale or judgment, or order, a family homestead not exceeding \$1,000 in value.

No statutory provision, however, has been cited and none exists, whereby the sum of \$1,000 is allowed in lieu of a homestead. If a husband living with his wife has no homestead, he may claim by virtue of Section 11738 of General Code, in lieu thereof and hold exempt from levy and sale, real or personal property not exceeding \$500 in value, in addition to chattel property, otherwise by law exempted.

By Section 11737, General Code, it is provided:

“When a homestead is charged with liens, some of which, as against the head of the family or the wife, preclude the allowance of a homestead to either of them, but others of such liens do not, and a sale of such homestead is had, then, after the payment, out of the proceeds of sale, of the liens so precluding such allowance, the balance, not exceeding five hundred dollars, shall be awarded to the head of the family, or the wife, as the case may be, in lieu of such homestead, upon his or her application in person, by agent or attorney.”

The claim of the defendant Christy must be disposed of by either section 11737, General Code, or Section 11738, General Code, and in either case, the result is the same. He is entitled to only \$500 out of the proceeds of the sale of the property, and this he has already received. We hold, therefore, that he has no right in or claim against the fund in question.

The claim of the First National Bank of Cortland depends upon the determination of the question whether by the rendition of the judgments in its favor against the said Henry C. Christy a lien was created against the real estate, or against Christy's interest therein, held under the land contract with Lizzie H. Neff.

No lien founded upon the execution levied on March 7, 1911, can be asserted because the levy was made within four months prior to the filing of the petition in bankruptcy against Christy, which was followed by his adjudication as a bankrupt. By favor of Section 676 of the bankrupt act of 1898, as repeatedly decided, any lien so acquired would be null and void and the property affected released therefrom.

The ultimate question for decision in this case, therefore, is, does the rendition of a judgment in the court of common pleas create a lien against the equitable interest of the judgment debtor in real estate within the county where the judgment is rendered?

This question has been answered in the negative by our Supreme Court in a number of decisions. As early as 1824 it was held in *Manley v. Hunt*, 1 Ohio, 257:

“Where land is sold but not conveyed, it is not affected by a subsequent judgment against the vendor, the vendor holding under a contract, and not having the legal title until after the judgment. An attempt to sell it upon execution, as the land of the vendor, will be restrained by injunction.”

In *Schuler v. Miller*, 45 O. S., 325, it is said in the opinion of the court, at page 331:

“The provision of the statute regulating judgments, that the lands and tenements within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered, is applicable only to legal interest in lands and tenements, to such interests as can be sold upon execution. The defendant or judgment debtor must have a legal title in order that the judgment may operate as a lien.”

In *Warner v. York*, 1 C.C.(N.S.), 73, decided by this court in 1903, paragraphs 4 and 5 of the syllabus read:

“4. An equitable interest in lands can not be reached by an attachment upon said lands.

“5. Nor does a judgment against the holder of an equitable interest in lands become a lien upon said lands.”

Unless the amendment of 1880 to Section 5374, R. S., now Section 11655, General Code, has changed the law on this subject, the rule must be considered as established, that a judgment does not create a lien upon an equitable interest in land, but attaches only to the legal title in lands and tenements.

Section 11655, General Code, now reads:

“The lands and tenements, including vested interests therein, permanent leasehold estates renewable forever, and goods and

1914.]

Cuyahoga County.

chattels not exempt by law shall be liable to be taken on execution and sold as hereinafter provided."

By the amendment referred to, the words "including vested interests therein" were inserted after the words "lands and tenements" and it is contended on behalf of the bank that Christy's interest in the real estate under the land contract was a vested interest, and, by virtue of Section 11656, General Code, which refers to "such lands and tenements" and makes them subject to a judgment rendered against the owner, his interest in the land became bound for the satisfaction of the judgments rendered against him.

Whatever the expression, "including vested interests therein," may mean, we do not think that its insertion in the statute has modified the rule long established in this state that the lien of a judgment does not attach to an equitable interest or estate in land.

The decision in *National Bank of Columbus v. Tenn. Coal, Iron & R. R. Co.*, 62 O. S., 571, does not, in our opinion, indicate any change of view on the part of the Supreme Court. The decision there announced was founded upon the finding that the judgment debtor had a legal and not an equitable title in the real estate involved, and therefore the judgment became a lien against said real estate.

In accordance with the conclusions here announced, the cross-petition of the defendant, Henry C. Christy, and that of the defendant, the First National Bank of Cortland, will be dismissed, and the fund in question is found and decreed to be the property of the defendant, J. C. Logue, trustee in bankruptcy for Henry C. Christy, free and clear of any claims or liens asserted by the other parties hereto.

**INSURANCE POLICY INTERPRETED "MOST STRONGLY
AGAINST THE INSURER."**

Court of Appeals for Mahoning County.

LEAH M. MCKELVEY ET AL V. THE EUREKA FIRE & MARINE
INSURANCE COMPANY AND THE SECURITY FIRE
INSURANCE COMPANY.

Decided, October Term, 1913.

Fire Insurance—Policy Construed in Harmony with the Known Intention of the Parties Thereto—Other Insurance Permitted by Agent with Full Knowledge.

If an agent of a fire insurance company, who has authority to write insurance, deliver the policy and collect the premium, and who has been correctly informed of other insurance on the property, attaches a slip containing the following, "Other insurance permitted to the amount of \$—," to a policy which provides that it shall be void if the insured has other insurance on the property, unless the agreement is endorsed on or added thereto, that no officer, agent or other representative of the company shall have power to waive any of the provisions or conditions of the policy, delivers the policy and collects the premium, he complies with the provisions permitting concurrent insurance, and the company is estopped from defending because of other insurance known to the agent at the inception of the contract.

Hine, Kennedy & Manchester, for plaintiffs in error.

J. W. Mooney, contra.

POLLOCK, J.; METCALFE, J., and NORRIS, J., concur.

The plaintiffs in error held a policy of fire insurance issued by the defendants in error, insuring a dwelling-house to the amount of five hundred dollars, and a barn to the amount of one thousand dollars. During the life of the policy the barn was totally destroyed by fire.

The plaintiffs brought an action in the court of common pleas of this county against the defendants to recover the amount of insurance on the barn.

1914.] -

Mahoning County.

The insurance companies filed an answer containing several defenses, a jury was waived and the action submitted to the court, which resulted in a judgment in favor of the defendants. To reverse that judgment this action is prosecuted.

The only defense in the action below, that is now under consideration, is that the policy was void for the reason at the time it was issued the plaintiffs had other insurance on these buildings.

The finding of facts made by the court below sets out that the policy contained the following provision:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto * * * shall be void if the insured now has or shall hereafter procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy.

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provision or condition unless such waiver, if any, shall be written upon or attached to, or shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

Also, that at the time this policy was issued these buildings were insured by two other policies in other insurance companies, to the amount of seventeen hundred and fifty dollars; that no written application was made by plaintiffs for this insurance, but at the time this policy was verbally applied for, the soliciting agent of the defendants was informed that these buildings were then covered by other insurance.

The defendant had supplied the soliciting agent with blank policies and authorized him to write insurance, deliver the policy and collect the premium. The agent, before he delivered the policy, attached to it a slip containing, among other things, the

amount of insurance on each building, and also the following: "Other concurrent insurance permitted to the amount of \$....."

It is urged that the insurance company is now estopped from defending on the provision of the policy quoted above, by reason of the knowledge that its agent had of the concurrent insurance on the property at the time he issued this policy, that under policies containing similar provisions the Supreme Court of this state has held that the insurance company does not waive these provisions simply because the agent had notice or knowledge of the condition which rendered the policy void, and received the premium. *Ins. Co. v. Titus*, 82 Ohio St., 161; *Ins. Co. v. Cook*, 62 Ohio St., 256; *Ins. Co. v. Meyers & Co.*, 62 Ohio St., 529.

It will be noticed that in the two cases last cited the condition which it is claimed waived the provision of the policy, occurred after its delivery. In the case of *Insurance Co. v. Titus*, *supra*, the mortgage incumbrance which rendered the policy void was placed on the property after the insurance had been issued, except the additional insurance of two hundred dollars.

The Supreme Court does not in any of these cases distinguish between conditions which were prohibited by the policy which existed and were known to the soliciting agent at the time the policy was delivered, and those which arose and came to the agent's knowledge after its delivery.

The holding of the Supreme Court above referred to seems to be against the weight of authorities when the condition which avoided the policy existed at the time of its inception, and the agent of the defendants had knowledge of these conditions at the time he wrote and delivered the policy and accepted the premium. The weight of authorities appears to be that where the agent who has authority to write insurance, delivers the policy and receives the premium was informed of other insurance by the insured and then delivered the policy and received the premium, without making the endorsement, the company is estopped from defending a claim for loss under the policy by reason of concurrent insurance existing at the inception of defendants' policy. *1st Vol. Fire Insurance*, by Clement, page

1914.]

Mahoning County.

418, and cases cited; *2d Vol. Fire Insurance*, by Clement, page 106, and cases cited; *Ostrander on Fire Insurance*, Section 243; *Cooley on Insurance*, Sections 2479 and 2482; *Seats v. Insurance Ass'n*, Vol. 104, Pacific, 185 and 189; *Spalding v. Fire Ins. Co.*, 52 Atlantic, 858.

Our attention has been called to the case of *The Northern Insurance Company v. Grandview Building Association*, 182 U. S., 308, cited in the case of *Insurance Co. v. Titus*, *supra*. The great weight that should ordinarily be given to a decision of the Supreme Court of the United States is weakened in this case by the fact that three of the justices of that court dissented, and for this reason, the decision has not been generally followed by the state courts. Vance, in his work on Fire Insurance, on page 366, refers to this case and points out the reasons for not following it as authority.

We refer to the fact that the greater weight of authority seems to be against the rule announced by our Supreme Court, only for the purposes of showing that the rule should not be applied to cases in which there are other facts in addition to those in the cases before the Supreme Court.

In this case the agent of the insurance company was informed by the insured at the time the application was made, of the prior insurance and he then attached to the policy the slip containing the following: "Other insurance permitted to the amount of \$...." We have here the two facts combined, that the agent of the insurance company when he wrote the policy knew of the insurance, and attached to this policy a consent for other insurance, complete in every respect, except that the amount permitted was left blank.

To carry into effect the intention of the parties at the time it was entered into should be the governing principle in the construction of a contract. The Supreme Court say, in the case of *Mintier v. Mintier*, 28 Ohio St., page 307:

"In giving construction to a contract, the intention of the parties will govern; and words which, in their strict legal import, are at variance with that intention, will be rejected, or construed so as to comport therewith."

And also further say, in the case of *Mosier et al v. Parry*, 60 Ohio St., page 388:

"Where the language of a contract is of doubtful import, it is proper to ascertain the circumstances which surrounded the parties at the time it was made, the object intended to be accomplished, and the construction which the acts of the parties show they gave to their agreement, in order to give proper instruction to the words they have used in the instrument, and to determine its legal effect."

At the time this contract of insurance was entered into both the insurer and the insured knew that the buildings covered by their policy was covered by other insurance, and that this policy was intended to be additional insurance on the property.

"The words used in a policy of insurance should be interpreted most strongly against the insurer where the policy is so framed as to leave room for two constructions." *Ins. Co. v. Kearney*, 180 U. S., 132.

And in the opinion in this case, on page 186, Justice Harlan says:

"This exception rests upon the ground that the company's agents, officers or attorneys prepare the policy, and it is its language that must be construed."

In the case we are considering it was the insurance company's agent that attached the slip containing this consent for other insurance, and following the rule above stated the doubt as to the construction that should be given this by reason of the words and character, "other insurance permitted to the amount of \$....," should be interpreted most strongly against the insurance company.

The Supreme Court of this state has said:

"Provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.

"If it be left in doubt, in view of the terms of the instrument and the relations of the contracting parties, whether the given words were used in an enlarged or a restricted sense, other things being equal, that construction will be adopted which is most beneficial to the promisee." *Webster v. Ins. Co.*, 53 Ohio St., 558.

1914.]

Mahoning County.

In the opinion in this case, on page 563, Justice Spear says:

"Perhaps technically speaking the claim is not one of forfeiture, for forfeiture is a deprivation or destruction of a right in consequence of the non-performance of some obligation or condition, and we are not accustomed to associate the idea of forfeiture with a contract which has not existed, but manifestly the law as to forfeiture will furnish a guide to the proper disposition of the question."

This language of Spear, Justice, is applicable to the case at bar. To adopt the construction claimed by the defendants in error that this policy should be read as though the word "none" was written in the blank after the dollar mark, would be permitting the defendants to receive premium on a contract of insurance which never had any existence; where the agent that had authority to write insurance knew of the existence of the condition that made the contract void at the time he delivered the policy and received the premium. This should not be done unless the clear construction of the policy required it. Following the above rules, what was the intention of the parties to this contract, gathered from a construction of the policy, the condition of the property, with reference to other insurance, the knowledge that the parties had, at the time the contract was entered into, of the other insurance, and the object intended to be accomplished. The better and sounder reasoning is that the insurer intended, by attaching this slip containing the provision permitting other insurance, the same to be a compliance with the other provision of the policy requiring that the agreement to permit other insurance be endorsed on the policy, and that the insured accepted it in that belief. The insured, when he agreed to purchase this insurance, intended it to be an addition to the amount of insurance that was then upon this property. He knew that the agent, when he delivered the policy, had knowledge of the other insurance, and seeing this slip attached to the policy, would place no other interpretation upon it than that it was a permission for other insurance.

A construction should not be given to an insurance policy that is opposed to the intention of the parties, gathered from the

policy and known circumstances at the time the contract was made.

Our attention has been called by the defendants to four cases, where slips were attached to the policies containing permission for concurrent insurance with a blank as to the amount permitted, similar to the one in the policy in suit, in which it has been held that a slip containing such a blank did not authorize concurrent insurance.

The first case is *Labelle v. Insurance Co.*, 28 Southwestern, page 133 (Texas). In this case the additional insurance was placed on the property after the policy in suit had been issued, and neither the company nor its agent had any knowledge of the additional insurance until after the property had been destroyed by fire.

In the cases of *Ins. Co. v. Biglow*, 37 Southern, 210 (Florida); *Miller v. Ins. Co.*, 128 N. W., 609 (South Dak.); and *Fountain v. Ins. Co.*, 134 N. W., 1090 (Iowa), and while the other insurance was on the property at the time the policies were issued, yet the agent of the company issuing these policies had no knowledge of the existence of the concurrent insurance at the time the policies were issued.

We think these cases are distinguishable from the case at bar, where the agent was notified by the insured at the time he made the application that there was other insurance on the property, and after receiving this notice he attaches the slip containing permission for concurrent insurance, with blank amount, and delivers the policy. The judgment of the court below is reversed, and judgment for the plaintiffs.

1914.]

Cuyahoga County.

DEFENSE OF FORMER ADJUDICATION BEFORE A JUSTICE OF THE PEACE.

Circuit Court of Cuyahoga County.

C. E. HOWARD v. J. KOBLITZ & COMPANY.

Decided, May 22, 1912.

Former Adjudication—Justice Judgment Appealed and Case Dismissed for Want of Prosecution—No Bar to Another Action.

A judgment of a justice of the peace appealed to the common pleas court where the case is subsequently dismissed for want of prosecution is no bar to a subsequent action upon the same cause of action or a part thereof.

J. H. Saltsman, for plaintiff in error.

F. C. Scott, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

C. E. Howard brought suit against J. Koblitz & Company in the court of common pleas to recover damages of said defendants for the alleged conversion of certain wooden pulleys. The defendants filed an answer to the petition, in the second defense of which was set forth a prior recovery upon the same cause of action by the plaintiff against the defendants. The defendants in said second defense alleged, "that in the action before one John V. Ginley, then a justice of the peace in and for Cleveland township in said county and state, for the same cause of action alleged in the petition in this case, said plaintiff C. E. Howard, recovered a judgment against these defendants."

A reply was filed to this answer in the following terms:

"Now comes the plaintiff, and for his reply to the answer of the defendant, says: that an action was brought before Justice Ginley for part of the cause of action alleged in this cause, but further says that same was appealed to the court of common pleas and dismissed for want of prosecution."

A motion for judgment upon the pleadings was made by the defendants and granted by the trial court. This proceeding in

error is prosecuted to reverse the judgment so rendered in favor of the defendants below on the pleadings.

As the pleadings stood when the motion was heard, it was admitted that the plaintiff had recovered a judgment in the justice court upon a part, at least, of the same cause of action set forth in the petition; that this judgment has been appealed from the court of common pleas and that the cause so appealed had been dismissed for want of prosecution.

The question to be determined here, then is whether the plaintiff in this action is barred from maintaining the same by reason of the recovery in the justice court of a judgment on the same cause of action, which had been appealed from and the appeal dismissed without trial upon the merits.

The precise question involved here was passed upon by this court March 24, 1911, in the case of *Artino v. Leparo* where, on a similar state of facts, it was held that the plaintiff was not barred from maintaining another action on the same claim involved in the former action.

Adhering to the ruling in that case, we hold that the court of common pleas erred in granting the motion for judgment on the pleadings, and the judgment of the court of common pleas is therefore reversed and remanded for further proceedings according to law.

1914.]

Hamilton County.

**ACTION FOR INJURIES FROM FALLING INTO AN OLD
CISTERN.**

Court of Appeals for Hamilton County.

WILLIAM P. DEVOU V. ANNIE HUGHES.

Decided, July 5, 1913.

*Landlord and Tenant—Liability of Owner for Injury from Falling Into
Cistern—Necessary Proof as to Defective Condition.*

In an action against a landlord for damages for injuries, sustained by a daughter of a tenant who fell into an abandoned cistern in the back yard while hanging out a washing, an allegation that the cistern was completely concealed from view by a growth of grass and weeds and that the cover of the cistern was in "an unsafe, unsound, rotten and dangerous condition," is not supported by proof which goes no further with reference to the cover of the cistern than to show that the rim was broken off.

Jackson & Woodward, for plaintiff in error.*Johnson & Levy*, contra.

SWING, J.; JONES, E. H., J., and JONES, O. B., J., concur.

This was an action in the court of common pleas by Annie Hughes against William P. Devou for damages resulting from injuries received by Annie Hughes by falling into a cistern which was located upon the premises of said Devou. The gist of the action is thus set out in the amended petition of the plaintiff:

"Plaintiff, Annie Hughes, a colored girl, states that on or about the 28th day of July, 1908, her father for the use of himself and family, including plaintiff, rented from the defendant as a tenant from month to month, the second floor of the premises known and numbered as 620 West Fourth street, in the city of Cincinnati; that defendant was the owner and in charge of the premises herein referred to and the building thereon, the rooms in which defendant rented to different tenants; that in the rear of said building on said premises and appurtenant thereto was located a yard used by the consent of the defendant in common by the various tenants of defendant including plaintiff and her father for the purpose, among other things, of drying washing, the surface of which was covered with a thick growth of long

grass, weeds and underbrush; that concealed under said growth of long grass and weeds in said yard, and located on said premises and completely hidden from view, was a cistern the covering of which the defendant negligently permitted to become concealed from view and in an unsafe, unsound, rotten and dangerous condition of which—its existence and the dangerous and unsafe condition—plaintiff and her father were at all time unaware and in total ignorance; that defendant was at all times during the tendency herein referred to in the control of said premises and in charge thereof, and that on the 6th day of August, 1908, that while walking through said yard engaged about the family washing she stepped upon the grass and weeds which had overgrown and concealed the covering of said cistern, and without any fault or negligence on her part in the exercise of due care, but solely by reason of the defective and dangerous condition of said covering and cistern which was concealed in the manner above stated, she fell into same and was hurt.”

At the close of the evidence for the plaintiff, defendant moved the court to instruct a verdict for the defendant, and this motion was renewed at the close of all the evidence, both of which motions were overruled by the court. A verdict and judgment was entered for the plaintiff in the sum of twelve hundred and fifty dollars.

The evidence clearly shows that the yard was overgrown with weeds and grass, and it further shows that the cistern was concealed from view by this grass and weeds; but as to the covering of said cistern, which was alleged to be defective in that it was in an “unsafe, unsound, rotten and dangerous condition” it is not clearly shown; in fact, all that was shown in regard to it was that part of the rim had been broken off. Whether by reason of this rim being broken the covering was displaced when the plaintiff stepped on it or whether it did not properly cover the cistern the evidence does not show. The defendant would have been liable, no doubt, if the evidence had shown either of these facts, but it must be evident that in order to sustain the judgment the evidence should show that the injury was caused by a defect in the cover, and that by simply proving that the rim was broken does not go far enough in proving that the action occurred by reason of the broken rim.

1914.]

Cuyahoga County.

The special finding of the jury that the accident was caused by "negligence in not keeping the yard in proper condition" does not throw much light on the question for the reason that it does not point out the improper condition that the yard was in, even if the jury meant that the cistern was in the part of the yard that was not kept in proper condition.

The evidence showed that the injuries were very serious and permanent, and the amount of the judgment was very small. We do not think the judgment is sustained by sufficient evidence, and for this reason it is reversed and the cause remanded for a new trial. We find no other error in the record.

Cause remanded to the court of common pleas for further proceedings according to law.

PEDESTRIAN STRUCK BY AUTOMOBILE AT STREET CROSSING.

Court of Appeals for Cuyahoga County.

HERMAN SCHMIDT V. JENNIE SCHALM.

Decided, December 24, 1913.

Contributory Negligence—By Woman Crossing Street in Front of Approaching Automobile—Misconduct of Counsel in Referring to Liability Insurance Company as Interested in Case on Trial.

1. A woman who attempts to cross a street in front of an approaching automobile in broad daylight, and is struck and injured, is not entitled to a verdict for damages against the owner of the machine, for the reason that she was manifestly guilty of contributory negligence, either in failing to look in the direction from which vehicles might be expected, or in stepping in front of the machine notwithstanding the evident peril in so doing.
2. In an action for damages against the owner of an automobile, intimations by counsel that some insurance company is interested in preventing a recovery, or questions to prospective jurors, in their examination on their *voir dire*, as to whether they are connected in any way with any liability insurance company, is prejudicial to the rights of the defendant and highly improper.

Guthery & Guthrey, for plaintiff in error.

Harry F. Payer, contra.

MEALS, J.; GRANT, J., concurs; WINCH, J., not sitting.

Jennie Schalm recovered a judgment in the court below against Herman Schmidt for personal injuries sustained by her in being struck by an automobile. Error is prosecuted in this court to reverse this judgment.

At the close of the plaintiff's evidence given on the trial, the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was refused. At the conclusion of all the evidence offered in the case this motion was renewed. It is claimed by the defendant that the court erred in overruling these motions.

The accident occurred on the morning of September 19, 1911, at the intersection of Superior avenue and East 51st street, in this city. The plaintiff alighted from an east-bound street car, on the east crossing of 51st street, walked around the rear end of the car and started to walk north across Superior avenue. When she had crossed the east-bound track and had reached the devil strip, she stopped. She says that she looked up and down the street, but saw no danger and started to cross the street. Other than this, she says she has no recollection of what occurred. When she had reached the devil strip the street car from which she alighted had advanced in an easterly direction about fifty feet or more, and the automobile which struck her, according to the testimony offered by her to sustain her case, was about thirty or forty feet east of the east crossing of 51st street traveling west at a rate of speed of about twenty-five miles an hour, with the "left wheels being just about the north rail of the west-bound track and the right wheels over toward the curb." It was daylight and there was nothing on the street to obscure her view of the machine. If she looked up and down the street as she says she did, she must have seen its approach. She then "started to go ahead again. She took three or four, possibly five steps which took her about four feet beyond the north rail of the west-bound track where she stopped suddenly and stood as one dazed." Had she "stood still where she first stopped. the automobile would have passed her without striking her. When she stopped at the point four feet beyond the north rail,

1914.]

Cuyahoga County.

she was right in the path of the automobile if it had gone straight ahead."

The conductor of the street car, who was standing on the rear platform thereof and who was offered as a witness on behalf of the plaintiff, testified that when he first saw the automobile it was thirty or forty feet east of the crossing; that the brakes were set and the rear wheels thereof were locked and sliding; that when the automobile was about ten or fifteen feet from Mrs. Schalm "it turned around suddenly, almost whirled in its tracks. The rear wheels skidded on the pavement, which was wet, and the rear left fender struck Mrs. Schalm. She did not move either way from the position in which she had stopped the second time. When the automobile stopped it was facing northeast; the front wheels were up near the curb stone and the rear wheels were passed the 51st street crossing; the front part of the machine being east of the crossing. When Mrs. Schalm was picked up she was eight or ten feet west of the east crossing and about eight feet from the north rail of the west-bound car track."

One other witness gave testimony in support of the plaintiff's case, but his testimony is not in conflict with that which was given by the conductor of the street car, but tends to corroborate it. The plaintiff claims that her injuries are directly attributable to the negligent rate of speed at which the automobile was being operated at the time she attempted to cross the street. When she stopped on the devil strip she was in a position of safety. Had she maintained this position it is admitted that she would not have been injured. If she looked up and down the street, as she says she did, she must have seen the automobile. If she saw the machine she was clearly guilty of negligence in walking in front of it. If she did not see it, it is certain that she did not look to see it, as the machine was but thirty or forty feet away from her and her view of it was unobstructed. If she did not look, knowing that automobiles and other vehicles were likely to be passing that point at that time in a westerly direction, she was guilty of contributory negligence. Any other rule would throw the whole burden of care

upon the driver of the automobile and relieve pedestrians in the street of any duty of care whatsoever. The law is otherwise.

We are therefore of the opinion that the plaintiff's conduct as shown by the evidence offered by her, leaves no rational inference but that she was negligent in walking in front of the defendant's automobile, and that her own negligence contributed directly to the injuries which she sustained.

In *Woodworth v. Railway*, 1 C.C.(N.S.), 483, the plaintiff alighted from an east-bound car at Auburndale avenue, East Cleveland, and "walked around the end of the car across the first track and onto the devil strip toward the second track at an ordinary gait, and as he was still stepping forward and was about to touch the south rail of the west-bound track, he saw the west-bound car and its headlight in front of him, and some portion of the car struck him and knocked him down and injured him." He neither stopped to observe nor did he look eastward upon the west-bound track. Had he done so as was his duty before going upon the west-bound track, he might have seen the approach of the car which struck him. The court held that while the railroad company was undoubtedly negligent in running the west-bound car which struck the plaintiff at too great a rate of speed in passing the car that was stopping at the crossing, the plaintiff himself was guilty of negligence contributing to his injury and therefore could not recover. This case was affirmed by the Supreme Court.

And so in the case at bar, it is immaterial that the automobile which struck the plaintiff was being driven at a negligent rate of speed at the time of the accident. The plaintiff having contributed to her own injuries can not recover against the defendant, no matter that he was negligent.

In *Shott, Admr., v. Korn*, decided July 23, 1913, and reported in 17 C.C.(N.S.), 393, the Court of Appeals of the First District held that it was not "error to instruct a verdict for the defendant owner of an automobile in an action for the death of a pedestrian where it appears that the deceased attempted to cross a well lighted street in front of the approaching machine which was in full view with its lamps burning." In the opinion the court said:

1914.]

Cuyahoga County.

"The accident occurred at 8:37 o'clock on the evening of May 5, 1912. Benjamin Shott was killed by being struck by an electric automobile, the property of Edna Farrin Korn, at the intersection of Rockdale avenue and Reading road, in this city. Shortly before the accident it had been raining, but it was not raining at the time. The automobile was going south on Reading road, and the decedent, Shott, was preparing to cross Reading road from east to west. The automobile had its lights burning, and the street at that point was lighted by electric lights so that Shott could have seen the automobile and the driver of the automobile could have seen Shott. There were no obstructions in the street. One witness alone saw the accident; this was Mr. Downing, who was standing at the intersection of the two streets. He testified: 'I saw a pedestrian half across the street and a machine coming from the northern intersection of Rockdale avenue and Reading road. I paid only casual attention to it at the time, but when I saw neither the pedestrian nor the machine slacken, of course that was a realization that there was an accident imminent. I did not see the actual contact of the machine and the body, because of the automobile—the machine coming between my line of vision and the decedent—but I heard him strike the ground. I judge the car ran in the neighborhood of 75 or 80 feet after striking the man.' "

The court further said:

"From the evidence it seems clear to us that Shott was guilty of contributory negligence and that his death was caused by it. The machine was in plain view quite a distance before he started across the street. There was nothing to obstruct his view and there was nothing to obstruct his mind or prevent him from exercising the prudence which he should have exercised in looking for approaching vehicles when about to cross the street. He seems to deliberately have walked in front of the approaching machine. Under the evidence we think the court was justified in directing the jury to return a verdict for the defendants. The facts were really not in dispute and it became a question of law for the court.

"We are of the opinion that the circumstances of this case admit of no rational inference but that of negligence on the part of the plaintiff. Of this we believe no two reasonable minds could disagree. It therefore became the duty of the court on the defendant's motion, at the close of the evidence offered by the plaintiff, to direct the jury to return a verdict for the defendant. It follows that the court erred in not so doing."

One other question is made by the record of this case which we deem of sufficient importance to notice briefly. While it is not necessary that we should pass upon it in view of the conclusion we have reached in the case, we think that a word or more upon the subject involved therein will not be amiss as a guide to the future conduct of this class of cases.

In the course of the impanneling of the jury, and while one of the prospective jurors was being examined on his *voir dire*, and in the presence of those who were later sworn as jurors in the case, counsel for the plaintiff remarked that doctors would probably be called upon to testify as to the physical condition of the defendant, both by the plaintiff and the insurance company.

Of course, no insurance company was a party to the action and on the record no insurance company was concerned in the outcome of the action. The court sustained an objection to this remark, and instructed the jury to entirely disregard any remarks made about an insurance company being connected with the case, as there was none and that the defendant in the case was Herman Schmidt. Counsel for the plaintiff thereupon stated that the remark was a slip of the tongue.

However this may have been, counsel for the plaintiff had effectually apprised the prospective jurors present that concealed under the coat-tail of Herman Schmidt, the defendant in the action, an insurance company was interested in the outcome of the case. The true defendant was thereby made to bear the burden of whatever prejudice existed in the minds of the jurors against insurance companies. This was manifestly unfair to him, as under a policy of casualty insurance the liability of the insurer is usually limited to a fixed amount. A recovery in excess of this amount in an accident case must be borne by the insured. Thus the defendant might have been very greatly prejudiced by such a remark. Moreover, an insurance company, if there be one that is in anywise interested in the outcome of the case, that is not a party to the action and does not have the right to plead or defend in the action, nor the right to show the nature and extent of its obligation to the defendant, should not be prejudiced in its rights by such remarks. The rights of

1914.]

Cuyahoga County.

the parties to an action should be determined by the pleadings and the evidence in the case and not by some extraneous consideration. Such remark as that referred to, if made purposely could have no other object than to prejudice the jury against the defendant, and is obviously improper.

Further in the impanneling of the jury counsel for the plaintiff asked several members of the panel who were later sworn as jurors in the case whether or not they were connected with an insurance company. Objection was made by counsel for the defendant to this line of inquiry, which the court overruled, remarking at the same time that counsel for the plaintiff should confine his questions to liability insurance companies. The purpose of these questions is manifest, and it is equally manifest that they were improper. In permitting them to be asked the court clearly erred. What difference did it make to the plaintiff whether an insurance company was interested in the outcome of the case or not? Her rights were not affected nor did they depend upon any such consideration, and if the trial had been properly conducted, she could not have been prejudiced by the fact that an insurance company was obligated to the defendant to bear some part of the judgment recovered against him. Besides the jury in all probability would not have known that an insurance company was in any way interested in the case had her counsel not called their attention to that fact. The suggestion that an insurance company was the real party in interest in the action, and that the questions asked in the impanneling of the jury were asked for the purpose of safeguarding the rights of the plaintiff, does not appeal to us. On the contrary, we believe that this contention but thinly veils a subterfuge.

After a very careful consideration of the question presented and an examination of many authorities on the subject, we have concluded that this practice is improper and must cease. We hope, therefore, that our conclusion in this regard, while not material to our decision in this case, shall serve the purpose of apprising all parties in interest that in the future we shall regard the admission of evidence or statements of counsel, tending to show that an insurance company is interested in the outcome of the trial, as reversible error.

We think the court erred in overruling the motion of the defendant to direct a verdict for him, for which reason the judgment is reversed and the cause is remanded for further proceedings according to law.

LIABILITY FOR INJURY CAUSED BY HOLE IN STREET.

Court of Appeals for Hamilton County.

THE CITY OF CINCINNATI V. JOSEPHINE HILES.

Decided, July 6, 1914.

Negligence—Municipality Permits Hole to Remain in Street—Woman Steps Into It and is Injured—Contributory Negligence on Her Part Defeats Recovery.

Where the city permits a bad hole to remain in a street and a street car passenger, who had knowledge of the existence of the hole, steps into it in alighting from the car and is injured, the direct cause of the accident is not the negligence of the city in permitting the street to get out of repair, but the contributing negligence of the one so injured in not observing proper care in using the street.

*Alfred Bettman and Coleman Avery, for plaintiff in error.
Horace A. Reeve, contra.*

SWING, J.; O. B. JONES, J., and E. H. JONES, J., concur.

This case is in this court on error to the judgment of the Superior Court of Cincinnati, wherein defendant in error recovered a judgment against the plaintiff in error in the sum of \$1,250.

In said court Josephine Hiles brought her action against the Cincinnati Traction Company and the city of Cincinnati. The action was for damages for injuries received by said Josephine Hiles by reason of a defect in one of the streets of Cincinnati, to-wit, Spring Grove avenue, into which plaintiff stepped, and which resulted in quite a serious injury to her. She alleged that the hole in the street into which she stepped was at a point where the Cincinnati Traction Company stopped its car on which she was a passenger and at which point she desired to

1914.]

Hamilton County.

alight; that the city of Cincinnati was guilty of carelessness and negligence in permitting said Spring Grove avenue to become and remain out of repair and permitting said hole to remain and be in said pavement, and that said city of Cincinnati was careless and negligent in that notwithstanding it had caused to be built and maintained an electric lamp near the said half-way stop for the purpose of lighting said Spring Grove avenue at said point, it negligently and carelessly permitted the said lamp to remain unlighted on the said evening at the time when said accident happened to plaintiff; that said city in the exercise of ordinary care was bound to know that said Spring Grove avenue was out of repair and in a dangerous condition to pedestrians at the time and place where said accident happened to the said plaintiff. She further alleged that when she alighted from the car she was in the exercise of due care and caution and without any negligence whatever, but that the said Cincinnati Traction Company, defendant, was careless and negligent in stopping its said car and inviting its passengers to alight at a place in Spring Grove avenue which was then and there unsafe and dangerous.

The Cincinnati Traction Company filed a demurrer to the petition, on the ground that it did not state a ground of action against the said company and that there was a misjoinder of parties defendant. Said court found this demurrer well taken, and dismissed the traction company, and the case then proceeded to trial against the city of Cincinnati, with the result hereinbefore stated.

The case was argued in this court quite a long time ago and has been under discussion by us several times, and only lately have we arrived at a conclusion which is satisfactory to all the members of the court.

Considerable evidence was heard on the trial, and after a careful consideration we are of the opinion that there is very little, if any, conflict in the evidence. The facts are substantially these: There is no question as to the injuries received by the plaintiff; there is no question but that the street was very much out of repair, not only at the point where the accident occurred, but the street generally was very much out of repair and in very bad condition. The hole in the street into which plaintiff

stepped and received her injuries was described as being about four feet long and two feet wide, and at some points as deep as eight inches. It was so deep, in fact, that the rail and ties of the street car company were exposed to view. The point at which the plaintiff alighted was called a half-way stop. Not far from this halfway stop was a regular stop, and the evidence shows that at that point the street was in a safe condition, and the evidence further shows that the plaintiff could have stopped at this latter point without any great inconvenience to herself. The evidence further shows that the plaintiff had been living opposite to the point where she alighted, for some ten days or more; that she had gotten on and off the car at this point several times previous to the accident and that she was familiar with the condition of the street at this point.

The evidence further shows that the condition of the street was in plain view from the surrounding houses and sidewalks, and was in no way concealed.

Under these circumstances, has plaintiff any right to recover in this case? We are of the opinion that she has not. She not only had knowledge in fact, but was bound to know that the street was out of repair at the point where she alighted from the car. It does not appear that there were any facts existing at the time she alighted which prevented her from using the knowledge which she had as to the bad condition of the street. It seems to us that she did not exercise that ordinary care and prudence which one is bound to use in stepping onto a street which she knows to be in an unsafe condition.

Whether or not the street car company was guilty of negligence in the stopping of its car at a point in the street where the street was in a dangerous condition and inviting the passengers to alight at that point and thereby became liable to the plaintiff, is not here for our consideration, as the plaintiff elected to proceed against the city of Cincinnati, alone.

But it seems to us that the negligence of the city in permitting the street to get out of repair, was not the direct cause of the accident, but rather that the contributory negligence of the plaintiff in not observing the proper care on her part in using

1914.]

Wood County.

the street, was the direct cause of the accident and therefore the city could not be held liable.

Under the facts, we think the court below should have directed the jury to return a verdict for the city, and that the judgment should be reversed, and judgment entered in this court on that ground.

Other errors were assigned, but under the holding at which we have arrived, they are not material.

DISTRIBUTION OF RESIDUE OF ESTATE.

Court of Appeals for Wood County.

JOSEPH A. HOLMES AS EXECUTOR OF THE WILL OF PETER FACKLEMAN, DECEASED, v. HEINRICH FACKLEMAN.

Decided, May 8, 1913.

Wills—Construction of Devise of Residue Bequeathed to Nephews and Nieces.

The testator bequeathed the residue of his estate to the children of his two sisters, share and share alike. *Held:* That the division should be made among said children *per capita* and not *per stirpes*.

Fries, Powel & Smiley, for plaintiff.

Benj. F. James, contra.

KINKADE, P. J.; RICHARDS, J., and CHITTENDEN, J., concur.

Appeal from Court of Common Pleas of Wood County, Ohio.

This was an action in the court of common pleas to secure the construction of the will of Peter Fackleman, deceased. The clause in dispute was paragraph number three of the will which reads as follows:

“Third: I give, devise and bequeath all the residue of my estate after paying my just debts, funeral expenses, and erecting the monument heretofore mentioned to the children of my sisters, Margaret Fackleman and Marion Fackleman, to be equally divided between them share and share alike. If any of the children of my said sisters shall have died leaving children, then

it is my will that the share of the said child or children of my said sisters, Margaret Fackleman and Marion Fackleman, shall be equally divided among the children of such deceased child or children."

The only portion of this paragraph to which we need give any attention is the first clause. The two sisters mentioned, Margaret and Marion Fackleman, were dead at the time of the execution of the will. One of them had nine children living, and the other four. The sole question is should the estate of the testator be divided into two parts, one half going to the nine children of one sister and the other half to the four children of the other sister, or should the estate be divided into thirteen parts, one thirteenth going to each child.

We are very clearly of the opinion that the latter method of division is the proper one under the clause of the will quoted, and we think this conclusion is fully sustained by the following cases: *Huston v. Crook*, 38 O. S., 328; *Mooney, Guardian, v. Purpus, Executor, et al*, 70 O. S., 57; *Hughes et al v. Hughes et al*, 82 U. S., 408 (same case in 118 Ky., 751); *McIntyre v. McIntyre*, 192 U. S., 116.

We think the authorities cited, to sustain the contention that the estate should be divided into two parts, one of each to go to the children of each sister, are not in accord with the holdings of our own Supreme Court, nor in accord with the language of the United States Supreme Court in the case cited above.

We hold that the estate should be divided into thirteen parts, and passed to the children of Margaret and Marion Fackleman as an entire class, share and share alike as stated in the will, each taking a thirteenth part.

STATE NOT ANSWERABLE FOR INJURIES SUSTAINED AT THE HANDS OF ITS OFFICERS.

Circuit Court of Cuyahoga County.

ELLEN HUNT V. STATE OF OHIO.*

Decided, May 22, 1912.

Damages for Incarceration in Hospital for Insane—Action Against State Can Not be Maintained.

1. The state is not answerable in damages to an individual for an injury resulting from misconduct or unauthorized exercise of power by its officers and agents in governmental matters.
2. Notwithstanding an enabling act authorizing the suit to be brought, a petition asking damages for the alleged wrongful act of a probate judge in adjudging the plaintiff insane and for acts of violence and other forms of mistreatment claimed to have been inflicted upon her by the officers and employees of a state hospital where she was committed, does not state a cause of action.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

On the 17th day of May, 1911, the Legislature passed an act, entitled, "An act for leave to sue the state of Ohio, to adjudicate a claim of Miss Ellen Hunt," and which was in the following language:

"WHEREAS, one Ellen Hunt, of Cleveland, Ohio, was hereinbefore, to-wit, on the 2d day of September, 1897, adjudged insane and committed to the Cleveland State Hospital for the insane; and

"WHEREAS, said Ellen Hunt claims said adjudication and said commitment were illegal; and

"WHEREAS, said Ellen Hunt claims to have suffered great damage, thereby; now therefore,

"Be it Enacted by the General Assembly of the State of Ohio:

"Section 1. That the said Ellen Hunt be and she is hereby permitted and empowered to commence an action in the Court of Common Pleas of Cuyahoga County against the state of Ohio, that the said claim as hereinbefore set forth may be properly determined; service of process shall be made upon the attorney-

general who shall represent the state in this action. Should the said Ellen Hunt recover judgment in said action, then in that event the Auditor of State is authorized and directed to issue a warrant for the amount of such recovery and costs in favor of said Ellen Hunt."

After this act was passed, Ellen Hunt brought suit in the court of common pleas against the state of Ohio, and in her amended petition sought to recover damages for the alleged wrongful act of the probate judge of Cuyahoga county in adjudging her insane, and for acts of violence and other forms of mistreatment claimed to have been inflicted upon her by the officers and employees of the Cleveland State Hospital where she was committed.

A demurrer to the amended petition was filed by the state on the ground that it did not state facts sufficient to constitute a cause of action against the defendant in favor of the plaintiff.

The demurrer was sustained, and the plaintiff not desiring to amend or further plead, judgment was entered thereon against her. This proceeding in error is prosecuted to reverse the said judgment.

The act in question attempted to create no cause of action. Reference to the preamble shows that the Legislature merely recognized that the plaintiff in error claimed to have been illegally adjudged insane and committed to the state hospital for the insane, and to have suffered great damage thereby. The bar that stood in the way of her suing the state was removed, in order that her claim might be determined. The validity of her claim was in no way recognized or approved. This was left to be dealt with by the courts, and determined by reference to established legal principles.

The principle of law that the state is not answerable in damages to an individual for an injury resulting from misconduct or unauthorized exercise of power by its officers and agents in governmental matters, is universally established. The rule and the reason therefor are stated by Story, in his work on Agency (9th Ed.), Section 319, in this language:

1914.]

Wood County.

"It is plain that the government itself is not responsible for the misfeasance, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations, in endless embarrassments and difficulties, and losses, which would be subversive of the public interests."

See also, *Lewis v. State*, 96 N. Y., 71; *Bain v. State*, 86 N. C., 49; *College, etc., v. Cleveland*, 12 O. S., 375; *Cincinnati v. Cameron*, 33 O. S., 336; *Robinson v. Greenville*, 42 O. S., 625.

Under this principle of law, the amended petition of the plaintiff in the court below stated no cause of action against the defendant, the state of Ohio, and the demurrer was properly sustained.

ACTION ON COGNOVIT NOTE ONCE IN JUDGMENT.

Circuit Court of Wood County.

HUBBARD S. WOODBURY v. FRED J. BOLLMEYER & CO. AND
J. H. SHERWOOD ET AL.

Decided, May 3, 1912.

Promissory Notes—Judgment on Cognovit Note Vacated and New Trial Granted—Competency of Testimony of the Widow of One of the Makers—Burden of Proof.

1. In an action on a promissory note, where one of the makers is denying that he executed the note or that there was consideration therefor, it is not error to permit the widow of the other maker to testify as to certain matters which arose between herself and her husband when no other person competent to be a witness was present.
2. Where judgment taken on a cognovit note is vacated and a new trial awarded with the assent of counsel, and one of the defendants is denying consideration, the case stands as though no judgment had ever been entered, and the burden of proof follows the rule laid down in 81 Ohio State, 121.

L. H. Morgan and Ladd & James, for plaintiff in error.
F. H. Wolf and N. R. Harrington, contra.

KINKADE, J.; WILDMAN, J., and RICHARDS, J., concur.

Error to the Court of Common Pleas of Wood County, Ohio.

This is a proceeding in error to reverse a judgment of the court of common pleas entered in favor of the defendant in error, J. H. Sherwood, in an action based upon a promissory note. At the May term, 1908, of the Court of Common Pleas of Wood County, Ohio, plaintiff in error, Hubbard S. Woodbury, took judgment upon a cognovit note against all of the defendants in this action. At the same term, in July, 1908, J. H. Sherwood sought to have this judgment vacated as against him, setting up that he had a valid defense thereto, to-wit: that he had never executed the note, and that the same was without consideration. A hearing was had at that term and a finding made in favor of Sherwood upon that application. The journal entry covering the action of the court at that time appears to have been prepared by Handy & Wolf, counsel for Sherwood, and to have been approved by Lewis W. Morgan, attorney for Hubbard S. Woodbury.

Instead of following the usual practice of suspending the judgment pending hearing of the question as to the validity of the defense presented by Sherwood, the journal entry approved by counsel for both sides as stated, goes much further than is usual and vacates the judgment and grants Sherwood a new trial. After reciting that the court has had presented evidence tending to show that a defense existed in behalf of Sherwood, to-wit, that he never executed the note, that his signature thereto was a forgery, and that he should be given an opportunity to defend, the entry says:

“It is therefore adjudged that said judgment be and the same is hereby opened up and vacated and a new trial is granted to the said J. H. Sherwood.”

Then follows a statement preserving liens, etc., pending the trial, usually found in entries of this character. No exception was taken to this action of the court. Following the vacating of the judgment, the case was continued for nine terms.

The amended answer of Sherwood was filed in February, 1911, setting up the fact that he had never executed the note, that

1914.]

Wood County.

his signature thereto was a forgery and that the note was without consideration. The case coming for trial at the May term, 1911, was submitted to a jury on June 8th, and a verdict was rendered in favor of the defendant Sherwood. A motion for a new trial was overruled and judgment entered on the verdict.

Two grounds are assigned here why this judgment should be reversed. First, it is said that the court admitted incompetent evidence in this: that it permitted the wife of Bollmeyer, who was the daughter of one of the makers of the note, to testify in the case, and also permitted Sherwood to testify, and it is said in view of the fact that Fred J. Bollmeyer was at the time of the trial dead, and in view of the further fact that Mrs. Bollmeyer was testifying to certain matters which arose between herself and her husband when no other person competent to be a witness was present, that the evidence of both of these witnesses was incompetent. It is not contended that Woodbury is the assignee of the deceased maker, Bollmeyer, but it is said that the relation of the parties is such that he falls within the spirit of the law prohibiting parties thus related from testifying. We are unable to sustain the contention of counsel for plaintiff in error as to either point. We think the testimony of both witnesses was competent.

The other ground upon which it is sought to have the judgment reversed is that the court committed an error in saying to the jury in the charge, that the burden was upon the plaintiff to maintain his cause of action against Sherwood by a preponderance of the evidence. Counsel for plaintiff in error contends that a different rule applies in a case of this kind where a judgment is opened up and a defense thereto let in, than would apply if it were an action upon the note by Woodbury against Sherwood, and insists that in this action the burden is upon Sherwood to maintain by a preponderance of evidence the defense to the judgment which he claims, and counsel intimate in argument that perhaps the defendant should be required to establish a defense other than a mere denial of the plaintiff's claim.

We are unable to agree with this position. It is our opinion that when the judgment is suspended and particularly in this

case where, with the assent of counsel, the judgment is vacated in the journal entry and a new trial granted, that the case stands between the plaintiff and Sherwood precisely as though no judgment had ever been entered and that the plaintiff has the burden of proof to sustain his cause of action by a preponderance under the rule stated in *Ginn, Admr., v. Dolan*, 81 O. S., 121.

We think the court of common pleas stated the rule correctly as to the burden of proof in the charge to the jury, and finding no error in the case prejudicial to the plaintiff in error, the judgment of the court of common pleas will be affirmed.

GARAGES INCLUDED IN THE CLASS OF SHEDS OR BARNs.

Circuit Court of Cuyahoga County.

JOSEPH GROSS v. ISADOR WHITELAW.

Decided, May 22, 1912.

Building Restrictions—Garage is a Shed or Barn—Estoppel.

1. A garage may not be built upon a lot restricted against the building of sheds and barns.
2. Failure by one lot owner to object to the building by others of garages upon 14 out of 800 lots in an allotment as to which a uniform plan of improvements and restrictions has been adopted for the benefit of all the lots, will not estop said lot owner from enforcing the restriction with respect to another lot in his neighborhood.

Hidy, Klein & Harris and H. Ewing, for plaintiff.

Fred Desberg, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

This action was brought to prevent the defendant from building an automobile garage for his own private use upon his premises which are situated on South Boulevard in the city of Cleveland.

Defendant's lot is one of some eight hundred lots, all of which are subject to the same restrictions, imposed by the original proprietor, who laid out the entire property for select residence purposes.

To accomplish this it was provided by deeds to purchasers in this allotment that the several lots should each and all be used for residence purposes only, that no intoxicating liquor should ever be sold upon them, that no building should be erected costing less than \$3,000 nor nearer the street line than thirty feet, and that no shed, barn or shop should be erected or placed on any of said lots. By the deeds only hedges or iron fences are permitted, none to be nearer the street than forty feet.

The garage proposed to be built by defendant will cost \$1,000 or \$1,200.

This structure can not be built because of two prohibitions contained in the restrictions: it is a building which will cost less than \$3,000 and it comes within the meaning of the general words "shed and barn."

The derivation of the word "shed" indicates that it is a place erected for shelter and the word is frequently compounded with other words indicating the things usually sheltered in it, as "wood shed, carriage shed, cow shed," etc. If automobiles are sheltered in a building designed to shelter them, such building may properly be called an automobile shed, and in common speech one frequently hears this expression, though owners of automobiles and such sheds have imported the French word "garage," which they use more commonly these days in speaking of the building in which they keep their automobiles, which latter they commonly call motors. It is a matter of taste or style.

The word "barn" originally meant a place where farm produce is stored, but many people in the city call the building in which they keep their horses and carriages a barn, while more properly it should be called a stable, though some have both stables and carriage sheds or carriage houses, as they prefer to call them.

The evident intention of the general restriction imposed on all the lots in this neighborhood is to keep the back yards free from such buildings as are commonly erected in back yards. The restriction was drafted before automobiles had come into common use, but can it be said that defendant may build a structure which he calls a garage as long as keeps an automobile, and a shed or barn after he disposes of his automobile and stores something else in it?

The particular use to which he proposes to put this building does not change its character completely; it is still a shed.

In evidence it was shown on the trial that there are fourteen lots among the eight hundred in this allotment on which garages have been built without objection being made by plaintiff. One is across the street from plaintiff's premises and another in the same block. Defendant's lot is immediately in the rear of plaintiff's lot.

It is claimed by defendant that because plaintiff never attempted to enjoin the erection of said fourteen garages, he is estopped from asking the enforcement of the restriction to the defendant's deed.

The doctrine of estoppel is not to be applied here. Had the plaintiff erected any of these fourteen garages, or built one on his own premises, he would not come into court with clean hands and should have no relief; or, if garages had been built on so many lots that it appeared that the prohibition had been waived by mutual consent, and that the character of the neighborhood had changed, a court of equity would be slow in enforcing the restriction as to one particular lot; but we see no reason why plaintiff in this case is not entitled to the relief he prays for, and judgment is rendered for him.

1914.]

Hamilton County.

MONEY NOT EQUITABLY DUE SHOULD NOT BE RECOVERED

Court of Appeals for Hamilton County.

CAROLINE BAUER V. LOUIS E. NICKOL ET AL.

Decided, July, 1914.

Equity—Refusal to Hold Mortgagor Except as Indemnitor—Application of the Principle that "He Who Seeks Equity Must do Equity."

The mortgage which the plaintiff seeks to foreclose in this case can be regarded only in the light of an indemnity, and under the equity rule that "if money is not equitably due it ought not to be recovered," the petition is dismissed at plaintiff's costs.

Oscar W. Kuhn, for plaintiff.*Stephen W. Jones and Edward A. Tepe*, contra.

JONES, E. H., J.; SWING, P. J., concurs; JONES, O. B., J., not sitting.

"This is an equitable action, and if the money is not equitably due it ought not to be recovered."

This is the first sentence in an opinion by Judge Welch in the case of *White, Adm'r, v. Turpin*, 16 O. S., 270.

The above case was tried in this court on appeal from the court of common pleas, and is an action brought by the plaintiff for the foreclosure of a mortgage and marshaling of liens. The nature of the action can be briefly described by quoting from the defeasance clause of the mortgage which is the basis of the action:

"*Provided Nevertheless*, That whereas the said Caroline Bauer has advanced as a loan to Louis E. Nickol, the husband of the said Josephine B. Nickol, the sum of \$2,500 with which to enable him to build upon the premises of said Caroline Bauer, known as No. 2811 Woodburn avenue, Walnut Hills, Cincinnati, Ohio, certain new bakeovens for the use of Louis E. Nickol in carrying on a bakery in said premises, and to make certain other repairs, alterations and improvements in and upon said premises which the said Louis E. Nickol has agreed to take under a lease from the said Caroline Bauer for a period of ten years

from the 1st day of June, 1909. And whereas the said Caroline Bauer in order to obtain the said \$2,500 has been compelled to mortgage her said premises to the East Walnut Hills Building & Loan Company by the terms of which mortgage she is to make certain weekly payments of dues, interest and premiums until said loan is repaid in full. And whereas the said Louis E. Nickol has agreed to repay said loan by assuming and agreeing to pay the loan of Caroline Bauer to the East Walnut Hills Building & Loan Company and an additional weekly payment of \$2.50 on the principal; now if the said Louis E. Nickol shall pay said loan in manner and form as agreed to be paid by the said Caroline Bauer, including the additional weekly payment of \$2.50 for the purpose of hastening the payment of said loan, then this mortgage shall be void; and in case of default in making any of said weekly payments to the said East Walnut Hills Building & Loan Company on said mortgage, the said Caroline Bauer shall have the immediate right to foreclose this mortgage and recover for the full amount that may be due upon the mortgage given by the said Caroline Bauer to the said East Walnut Hills Building & Loan Company at that time."

The defendant, Louis E. Nickol, occupied the premises leased to him by plaintiff herein, and conducted a bakery therein, for about fifteen months, when he failed in business and was declared a bankrupt. We find that up to the time of his said failure, he complied with his agreement and paid to the building association the dues, interest and premium and an additional \$2.50 per week upon the principal of said loan. In addition to the \$2,500 borrowed by Mrs. Bauer from the building association, Mr. Nickol spent in making the improvements upon her property \$800 of his own money. His rent was paid at the rate of \$60 per month, according to the terms of the lease. About half the cost of the improvements was paid by him during his brief tenancy. Shortly after he became a bankrupt and was forced to quit business. Mrs. Bauer, his lessor, assumed charge of her property and make a new lease to one Anthony Lass, for a term of five years, at \$90 per month.

The defendant, Josephine B. Nickol, is the wife of Louis E. Nickol, and executed the mortgage herein sought to be foreclosed, upon her individual property, as a guaranty to Mrs.

1914.]

Hamilton County.

Bauer that the terms of the lease would be complied with by her husband. The lease provided that the bakeovens and other improvements, when made, should be a part of the real estate, and become the property of the lessor, Mrs. Bauer. No issue is made as to her right and title to said improvements.

Judge Welch, in the opinion in the case of *White, Admr., v. Turpin, supra*, asks the question: "In equity and justice then, ought this money to be paid a second time by the administrator?" The question before us is a similar one, viz: In equity and justice ought Mrs. Nickol be compelled to pay the balance due on the loan from the building association? A strict construction of her contract would possibly require an affirmative answer, but the day is past, if any day there ever was, when one must be awarded the "pound of flesh" for the sole reason that it is "so nominated in the bond." It has long been a familiar maxim in equity that "he who seeks equity, must do equity."

The demand of plaintiff in this action is harsh, unreasonable and unjust.

Mrs. Bauer will receive during the five years term for which Mr. Lass has rented her property in additional rent which will accrue to her by reason of the improvements made on her property by Mr. Nickol, sufficient money to pay the balance due to the East Walnut Hills Building & Loan Company on her loan; then she will still have the property and the rentals therefrom for many years to come. She has made no offer, whatever, to the defendant, Mrs. Nickol, either of the premises or of the additional rents derived or to be derived from the improvements made thereon. So far as the proceedings in this court show, there has been no offer or tender of any nature made by the plaintiff, and no disposition manifested by her to work out a just solution of the situation which Mr. Nickol's unforeseen business reverses and bankruptcy brought about.

We hold that, in view of the unexpected developments of the case and the short duration of Mr. Nickol's tenancy it can not be successfully contended that Mrs. Nickol could be held under her mortgage, except as an indemnitor against loss on the part

of Mrs. Bauer. "In ascertaining the intention of the parties the court must take into consideration not only the language of the contract, but the situation of the parties and the circumstances surrounding them at the time the contract was made" (22 Cyc., 85). Applying this rule, we are of the opinion that the most a court of equity could say for the mortgage held by Mrs. Bauer is that it can only be regarded in the light of an indemnity, the office of which is to protect Mrs. Bauer from any actual loss by reason of the transaction. In the trial of the case no effort was made to show that any loss was sustained by Mrs. Bauer. She suffered no loss by the transaction. On the contrary, we think the evidence shows that she gained thereby. The money sought to be recovered by her is, therefore, not equitably due, and as said by Judge Welch, "If the money is not equitably due, it ought not to be recovered."

The petition of plaintiff will be dismissed at her costs, and defendants may go hence without day.

BARRING OF A CLAIM AGAINST HEIRS OF A TRUSTEE.

Court of Appeals for Hamilton County.

KATE ROBSON ET AL V. FANNIE R. EVANS ET AL.

Decided, June 15, 1914.

Trusts—Running of the Statute of Limitations—As to a Claim Against the Estate of a Trustee—Bar Not Prevented from Falling by Continuation of the Trust—Partition—Sections 10876-7-8.

Beneficiaries under a trust can not maintain an action against the heirs and legatees of the deceased trustee or enforce a claim against their interest in the trust property, where no claim was asserted against his estate within the time fixed by the laws of administration.

Bettinger, Schmitt & Kreis, for plaintiffs.

Herman P. Goebel and Oliver M. Dock, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

1914.]

Hamilton County.

William Robson, a resident of Newport, Kentucky, died in May, 1880, leaving a considerable estate consisting of both personal property and real estate situated in Kentucky and Ohio. By his will, probated in Campbell county, Kentucky, an authenticated copy of which was filed in Hamilton county, after making certain devises and bequests he devised and bequeathed all the remainder of his real and personal estate in equal shares to his five children and to a granddaughter, who was the only representative of a deceased son.

Shortly after the death of William Robson an arrangement was made among his devisees whereby it was agreed that no partition or division of the real or personal property should be had for ten years, but that it should be taken charge of, managed and controlled by one of the sons, Charles Robson, for the benefit of all. Under this management Charles Robson took possession of the real and personal estate and managed the same up to the time of his death in October, 1897.

Shortly after the death of Charles Robson it was agreed by the interested parties that George A. Robson, his brother, should succeed Charles Robson as trustee under the previous arrangement and that he should hold and manage all of the property for the benefit of all, as had been done by his deceased brother.

At that time Kate Robson, the widow of Charles Robson, as his executrix rendered an account and obtained a receipt for stocks, notes and bonds turned over to George A. Robson as such trustee, and also made to him a cash payment which represented the income collected by her after the death of Charles Robson and before the appointment of George A. Robson as such trustee. It being discovered later that the amount of this cash payment was larger than it should have been, George A. Robson repaid to her the amount of such overpayment.

George A. Robson continued to act as trustee up to the time of his death which occurred about a year later, and after that time a new trustee who is still acting was agreed upon.

Under the will of Charles Robson, which was probated in November, 1897, he devised and bequeathed all of his property, which included his one-sixth share of the estate of his father

William Robson, to his widow Kate Robson for life, and after her death to their children. This widow and children as plaintiffs, in December, 1910, filed a petition praying for partition of the real estate devised by William Robson and that the one-sixth interest which belonged to them by virtue of the will of their father Charles Robson be set off to them in severalty.

To this petition a cross-petition was filed containing two causes of action, the first of which set out certain facts as to the description of the real estate and as to the charges made against some heirs, and as to the relationship of the parties, none of which raised questions involved in this appeal.

Under the second cause of action the cross-petitioners charge that Charles Robson as trustee during his lifetime collected large sums of money as rents and income from the real and personal property for which he did not account to the beneficiaries of the trust; that he also did not account for all the personal property which came into his possession and that the plaintiffs after his death as his heirs have failed to so account to defendants for such personal property or to turn over the rents, income and profits thereof to them, although requested so to do; they pray that the plaintiffs may be required to render such an account, and that their interest in the real estate be charged with the amounts found due on such account, and if the account exceeds the distributive share of the plaintiffs then they pray for judgment against them for the amount of such excess.

This case was disposed of below upon demurrer, and was brought into this court by the defendants on appeal, and all of the questions presented here are raised upon the demurrer to the second cause of action set out in the petition.

There is no claim made that the widow and children of Charles Robson, plaintiffs herein, themselves collected any money either as trustees or tenants in common of the real estate, or as joint owners of the personal property, for which they have not accounted. The defendants are seeking to hold, against the share of the property to which they are entitled under the will of Charles Robson, claims for money which they allege Charles

1914.]

Hamilton County.

Robson had collected or obtained possession of and failed to account for to them.

Under the family arrangement Charles Robson was the trustee of an express trust. His position as trustee ended at his death and he was succeeded by a new trustee in the person of his brother. The claim made by defendants against the plaintiffs is not to account for money collected or property received by them either as trustees or co-tenants since the death of Charles Robson. The gist of their action is the failure of Charles Robson to properly account for the money and property received by him as such trustee during his lifetime. Upon his death, although the trust continued to exist, his trusteeship terminated and it became the duty of his executrix to turn over to the succeeding trustee all of the property of said trust and to render to him a complete account of her administration; and at the same time, it became the duty of the succeeding trustee, or upon his failure the duty of the beneficiaries to demand such an accounting from the executrix of the estate of Charles Robson. At his death whatever was owing from him to the beneficiaries or to his succeeding trustee became a debt of the estate, and they were to that extent creditors of the estate and should have presented their claims to the executrix for allowance and payment. Any claim against him in relation to such trust accrued at the time of his death—the termination of his trusteeship. Being an accrued claim it should have been enforced against his estate within the time fixed by the laws of administration, and the fact that it was not enforced against the estate of Charles Robson does not warrant defendants to now assert it as a claim against his legatees and devisees or against their interest in the trust property. The only cases in which the heirs, devisees and legatees might be held liable are under the provisions of Sections 10876, 10877 and 10878, General Code. *Arbaugh v. Mellett*, 5 C. C., 297; *Roth v. Hummel*, Ct. Index, June 10, 1913; *Hall v. Blumstead*, 20 Pick (Mass.), 2.

The claim presented by defendants is not of a character that could be enforced under these sections; and if it were, the time

for its enforcement is barred by the limitation contained in Section 10878.

The cases as to a continuing trust, cited on behalf of defendants, might be applicable if this were a proceeding against Charles Robson now in life, but the fact that the trust is still continuing does not alter the obligation put upon his estate for the settlement, so far as his trusteeship is concerned.

The demurrer to the second cause of action set up in defendants' cross-petition will therefore be sustained, and a decree for partition may be had.

INJURY TO PASSENGER ALIGHTING FROM STREET CAR.

Court of Appeals for Hamilton County.

CINCINNATI TRACTION CO. v. HARRY LUEBKERT.*

Decided, June 2, 1913.

Negligence—In Attempting to Step from a Car in Motion—Answer by Jury to Interrogatory May be Disregarded, When.

Where the evidence clearly indicates that the car was in motion at the time plaintiff attempted to step off, a contrary answer by the jury to an ambiguously worded interrogatory will not prevent a reversal of the judgment.

Kinhead & Rogers, for plaintiff in error.

Horstman & Horstman, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

Error to common pleas court.

The action below was brought by Henry Luebker to recover damages for personal injuries received by him in alighting from a street car on which he was a passenger at Twelfth and Main streets in Cincinnati, Ohio. The car ran east on Twelfth street and stopped just before it reached Main street for passengers

*Dismissed by the Supreme Court, November 18, 1913, on motion of the plaintiff in error at his costs.

1914.]

Hamilton County.

to get off, and then turned the corner southward down Main street.

Plaintiff alleges in his petition that when the car stopped at the usual place for passengers to alight, he and other passengers prepared to alight from said car by means of the front platform and steps provided for such purpose; that two or three passengers immediately in front of plaintiff succeeded in so alighting, and plaintiff was preparing to step from the front steps of the front platform when the conductor signaled for the car to proceed and the motorman, responding to the signal, started the car while plaintiff was in the act of getting off, and he was thus caused to fall on the street his feet landing on the street while with his hands he still held to handle bars alongside of the front steps and was dragged and his back was struck severely against the front steps and front part of said car.

The traction company denies that plaintiff was injured while he was alighting from the car after it had been brought to a full stop, but avers that his injuries were caused by his leaving the car while it was in motion rounding the curve at the corner turning into Main street.

The issue raised therefore is a direct one of fact. The testimony is unusually clear and without conflict. It appears that two, probably three, passengers preceded Luebker in going to the front of the car when it neared Main street for the purpose of getting off. Two of these were called as witnesses by plaintiff, and gave their testimony. Both of them agree that they preceded plaintiff and that the car had stopped for the discharge of passengers and had started up again before either of the three attempted to get off. Bolander, who was in the lead of the three, waited for the car to swing around the curve so he could step off conveniently on the sidewalk. Zimmerman who followed him also says that he got off while the car was in motion, and plaintiff himself testified that he waited inside the vestibule and on the "top step" to let the other three get off before he stepped on the lower step to get off, and then he realized the car was moving, and being timid because of his unsound leg, but unable to remain standing on the step, stepped or fell down

to the street and still holding the handle bar was dragged by the car a short distance until it was stopped, and he was thus injured.

As these three passengers got off one after the other with plaintiff last, as all agree, and as both Bolander and Zimmerman are clear that the car was moving when they each got off, and as the car made no stop after starting round the curve until the accident had happened to plaintiff, it follows as a physical necessity that the car was moving when plaintiff got on the lower step and stepped off. Plaintiff himself admits it and there is no evidence contradicting it.

A special interrogatory was submitted to the jury in these words:

“Was the car moving in the curve, rounding the corner of Twelfth and Main streets, when Luebker, the plaintiff, placed himself on the front step preparatory to leaving the car?”

To which the jury answered “No.” This carries no particular weight, as undoubtedly plaintiff was inside the vestibule and on the upper step or platform some little time while waiting for those who preceded him to alight, and the wording used in the interrogatory might well be understood by the jury to refer to the period of time when he placed himself on the front platform, or “top step” as he called it, rather than his position on the lower step, which latter as we have seen must have been while the car was moving around the curve.

The verdict was not sustained by the evidence, and the court below should have granted defendant’s motion to instruct the jury to return a verdict for defendant. Judgment will be reversed, and judgment entered here for defendant.

**REGULATION OF INTERURBAN CARS WHEN ON THE TRACKS
OF A CITY COMPANY.**

Circuit Court of Cuyahoga County.

A. G. STAFFORD, A TAX-PAYER, v. THE CLEVELAND
RAILWAY COMPANY.

Decided, May 22, 1912.

*Street Railway Franchise—Regulation of Stopping Places and Fare—
Interurban Cars Operated by City Company.*

1. Under a renewal grant of a street railway franchise a municipal corporation has the right to provide that the street railway company may operate "express passenger service and other special cars" and in the regulation thereof the municipality may authorize a special rate of fare upon such cars and that they stop at certain designated places only for the purpose of taking on and letting off passengers.
2. When the cars of an interurban electric railroad company at the terminus of a street railroad company operating under a municipal franchise are turned over to the latter company and are operated by it on its own tracks, the interurban company retaining no control over said cars when so operated by the other company and having no contract with it as provided in Sections 9130 to 9133, inclusive, General Code, the cars become the cars of the city company and, as such, subject to regulation by the city council, under the terms of the franchise to the city company.

E. K. Wilcox and Geo. D. Hile, for plaintiff.

*Squire, Sanders & Dempsey, M. B. & H. H. Johnson, Blandin,
Hogsett & Ginn and Kline, Tolles & Morley, contra.*

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

The purpose of this action is to require suburban cars to be operated within the city limits in all respects as city cars are operated, and at the same rate of fare.

Under the "Taylor" grant or ordinance, so-called, city cars are required to stop to take on and let off passengers at all street intersections and other regular stopping places, and the fare

is three cents with transfer for one cent, which is rebated, if the transfer is used.

Suburban cars, after they enter the city, do not stop to take on city passengers, nor will they stop within the city to let them off, as they are returning to the city limits. A city fare of five cents, without transfer privileges, is also charged upon suburban cars.

The defendants to this action are the Cleveland Railway Company, operating under said Taylor grant from the city, and all the suburban or interurban electric railroad companies whose lines reach the city.

On the hearing the interurban electric railroad companies were all dismissed from the action, because no evidence was introduced tending to show that said companies were operating their cars within the city and collecting city fares, and because no evidence was before the court that any of them had entered into such contracts with the city company as are authorized by Sections 9130, 9131, 9132 and 9133 of the General Code of Ohio, which provide that while the cars of an interurban electric railroad company are being operated by it over and along the tracks of a street railway company in a municipal corporation, under a contract entered into between the two companies in the manner provided in said sections, the cars of the interurban company shall be subject to the obligations imposed by and upon the cars of the city company, and the fare charged *by the interurban company* within the municipality shall not be greater than that fixed in the franchise held or owned by the city company.

The only evidence in the case is to the effect that under some arrangement with the Cleveland Railway Company, the suburban cars are turned over to it, when they reach the city limits, and are operated by it and fares collected by it, within the city.

Such being the case, the suburban cars after they enter the city, being in effect cars of the Cleveland Railway Company, and being operated and controlled by it exclusively, the suburban companies are neither necessary nor proper parties to this suit. We have no evidence that they have any interest in the fares collected.

1914.]

Cuyahoga County.

The Cleveland Railway Company claims the right to operate said suburban cars in the manner complained of under Section 24 of the Taylor grant and an ordinance of the city of Cleveland, passed in conformity to said section on December 26, 1911. Said Section 24 reads, in part, as follows:

"The company (that is, the Cleveland Railway Company) may transport along and upon its lines, in suitable cars, such materials, supplies, appliances and tools as it may need for the construction, maintenances and operation of its roads. It may carry upon its passenger cars, or upon other cars, mail for the government of the United States. It may operate funeral-cars, observation cars, express passenger service, and other special cars, at rates to be fixed from time to time by the council of the city of Cleveland, not lower than the rate in force for the carriage of passengers from time to time, as is provided by the terms of this ordinance."

Said ordinance of December 26, 1912, reads as follows:

"WHEREAS, the Cleveland Railway Company is operating within the limits of the city of Cleveland the cars of the Cleveland, Painesville & Eastern Railroad Company, the Cleveland & Eastern Traction Company, the Cleveland, Southwestern & Columbus Railway Company, the Cleveland, Youngstown & Eastern Railway Company, the Lake Shore Electric, and the Northern Ohio Traction & Light Company by contract between the Cleveland Railway Company and said companies; and

"WHEREAS, all of said companies are engaged in interurban traffic and said cars are operated from the vicinity of the public square in the city of Cleveland to the various municipalities within and outside of Cuyahoga county; and

"WHEREAS, all of said companies are engaged in interurban traffic and said cars are operated from the vicinity of the public square in the city of Cleveland to the various municipalities within and outside of Cuyahoga county; and

"WHEREAS, Section 24 of ordinance No. 16238a authorizes the Cleveland Railway Company to operate express passenger service and other special cars at rates to be fixed from time to time by the council of the city of Cleveland and not lower than the rate in force for the carriage of passengers from time to time, as is provided by the terms of ordinance No. 16238a;

"Now, Therefore, Be it Resolved, by the council of the city of Cleveland, that the Cleveland Railway Company in the operation of the cars of the Cleveland, Painesville & Eastern Railroad

Company, the Cleveland & Eastern Traction Company, the Cleveland, Southwestern & Columbus Railway Company, the Cleveland, Youngstown & Eastern Railway Company, the Lake Shore Electric Railway Company, and the Northern Ohio Traction & Light Company, is hereby directed to stop the said interurban cars outgoing from the public square only for the purpose of taking on passengers whose destinations are to points beyond the city limits and to stop said interurban cars in-going to the public square only for the purpose of discharging passengers. Whenever practicable, by reason of existing 'Ys' and turnouts, the Cleveland Railway Company is directed to give the right-of-way to said interurban cars.

"Be it Further Resolved, That said interurban cars of said the Cleveland, Painesville & Eastern Railroad Company, the Cleveland & Eastern Traction Company, the Cleveland, Southwestern & Columbus Railway Company, the Cleveland, Youngstown & Eastern Railway Company, the Lake Shore Electric Railway Company and the Northern Ohio Traction & Light Company, operated by the Cleveland Railway Company, are hereby designated as special cars and as express passenger cars, and the rate of fare on said cars within the city limits is hereby fixed at five cents without the right of transfer either to or from said interurban cars; except where the right of transfer is stipulated in the suburban grant under which such cars are operated."

The Taylor grant was a renewal grant, and we hold that Section 24 was within the power of the city to enact. By said section the city granted the railway company the right to operate express passenger service and other special cars, and reserved the right to fix the rate of fare charged on such special cars, from time to time, the only condition being that the rates for such service and on special cars should not be lower than the rate in force for the carriage of passengers on regular city cars.

Having reserved this right to fix the rate of fares on special cars, the action of the city council in doing so on December 26, 1911, was within the terms of the contract between the city and the railway company, contained in the grant or franchise, and is lawful and binding upon both the city and the railway company and upon the public, for whom the council acted, as well.

Nor can there be any question that under the Taylor grant the company and the city can agree upon proper stopping places for cars and, having authorized express passenger service, that

1914.]

Wood County.

can only be obtained by eliminating many ordinary stops in the manner provided by the ordinance of December 26, 1911.

Plaintiff suggests that because said ordinance designates the cars to be specially operated as the cars of the suburban traction companies, naming them, said ordinance itself is ineffectual to grant the Cleveland Railway Company the right to operate them as it does, but is an effort to authorize the suburban companies to operate their cars in the city in an unlawful manner.

True, the cars are described as the cars of the suburban companies; they might have been described by color or number; the method used, however, was a convenient and proper one and no difficulty arises from it, for it is plainly stated by the ordinance that "the Cleveland Railway Company, in the operation of the cars (describing them as aforesaid) is hereby directed," etc. Nowhere in the ordinance is any direction or authority given to the suburban companies, and its entire purport is within the purview of the Taylor grant and it operated upon and binds the Cleveland Railway Company alone.

The petition is dismissed.

LIEN LOST BY FAILURE TO RECORD ASSIGNMENT OF MORTGAGE.

Circuit Court of Wood County.

ELECTA CONKLIN V. ROZELL TYLER ET AL.*

Decided, October 24, 1912.

Failure to Record Assignment of Mortgage—Renders Lien Invalid as to a Subsequent Innocent Purchaser from the Mortgagee—Steps Necessary to Make a Tender Effective.

1. Where a grantor of land accepts in part payment a note and mortgage, which he assigned but no record was made of the assignment, and subsequently the grantee and mortgagor reconveyed the property to the grantor, who promised to surrender the mortgage but delayed doing so, and in the meantime he sold the property to a

*Affirming *Conklin v. Tyler et al*, 13 N.P.(N.S.), 441.

third party who had no knowledge of the assignment of the mortgage, the said innocent purchaser takes the property free from the lien of the assigned mortgage.

2. To render a tender effective, it is necessary not only that it be made prior to the bringing of the action, but also that the amount be brought into court and paid over to the clerk before trial is had of the case.

E. D. Bloom, for plaintiff in error.

N. B. Harrington, contra.

KINKADE, J.; WILDMAN, J., and RICHARDS, J., concur.

Error to the Common Pleas Court of Wood County.

This was an action in the court of common pleas based upon certain promissory notes secured by two mortgages. There was no dispute as to the balance due upon four of the notes secured by one of the mortgages, nor as to the validity of that mortgage. The contest was with respect to one note secured by the other mortgage. As was found by the common pleas court, very little dispute, if any, existed between the parties as to the facts in the case touching even this note and mortgage. The question presented for our consideration can be stated briefly and the dates omitted, as they are numerous and not material to the decision of the question here.

Twenty acres of land were sold by the owner thereof and a deed executed; the grantee at the same time executed to the grantor a purchase money mortgage to secure the greater part of the selling price. After this occurred the grantor to secure an indebtedness of his own to a third party assigned the purchase money note and mortgage to the third party as collateral security for that debt. Following this the grantee concluded that the sale was one he would not be able to carry out and solicited the grantor to surrender his note and mortgage and take a reconveyance of the property. Three hundred dollars had already been paid by the grantee on the purchase price and for this he took a promissory note from the grantor, and executed a warranty deed in due form, reconveying the property to the grantor. The assignment of the purchase money note and mortgage by the grantor to the third party was not entered upon

1914.]

Wood County.

the record until long after this. The grantor explained to the grantee, upon receiving a reconveyance of the property, that he was unable at that time to return the purchase money note and mortgage for the reason that it was temporarily beyond his control and concealed the fact that he had hypothecated it for his own purposes, as stated.

After receiving a reconveyance of the property from his grantee the grantor placed the deed reconveying the property to him upon record and then sold the property to the defendants in this action prior to the time of the entering upon the record of the assignment of the purchase money note and mortgage that he had hypothecated, as stated, and the record shows that at the time the defendants (Tyler) bought the property they had no notice, actual or constructive, of the assignment of this mortgage by the grantor to a third party or that any such mortgage was outstanding. The record charged them with notice, of course, that such mortgage had been executed and recorded, and so far as the record of that mortgage was concerned it stood unreleased of record and the record also gave them notice that the mortgagor had, as stated, duly reconveyed the property to the mortgagee, the party from whom he had received title.

The question is whether, under this state of facts, a good faith purchaser of the property for value can hold the property, as against the owner of the mortgage by assignment, when there appeared nothing upon the record to charge the purchaser of the land with notice that the person holding the mortgage was the owner of it or that any one other than the original mortgagee had ever acquired any interest in it.

The court of common pleas held that the defendants having purchased the premises under the circumstances stated had a title thereto superior to that of the party holding the outstanding mortgage, the assignment of which had not been entered of record. We fully concur in the conclusion reached by the court of common pleas on this branch of the case.

The defendants in the case were allowed to recover their costs upon the ground that a tender of the full amount had been made before the commencement of the action.

We can not concur with the conclusion reached by the trial judge, as the record shows that it was admitted in court that the amount due on the 28th day of March was \$1,718, and shows that upon that day a tender was made according to a certain paper writing which is copied in the record, and the paper writing avers that the tender was made on the 29th. If the amount mentioned was the correct amount due on the 28th a tender of the same amount on the 29th, evidently would not be sufficient. This may be a mere error of dates and is not the serious thing that attracts our attention. Section 11390 of the code states distinctly what must be done to constitute a valid tender. The section reads as follows:

Section 11390. "In an action on a contract for the payment of money, if the defendant answers and proves that before the commencement of the action, he tendered payment of the money due thereon, and before trial pays to the clerk the money so tendered, the plaintiff shall not have judgment for more than the money so due and tendered, without costs, and shall pay the defendant his costs."

It will be noted that it is not sufficient to tender the amount prior to the suit, but that it is quite as important that the amount be brought into court and paid to the clerk, if the party making the tender would avoid a judgment for costs. Nothing appears in the record to show that this was done, and no claim was made in argument that it had been done.

In this state of the record we think the plaintiff is clearly entitled to recover costs as part of the judgment to which she is admittedly entitled to have entered in her favor on the third, fourth, fifth and sixth causes of action, and the judgment of the court of common pleas as thus modified will be affirmed.

MISREPRESENTATIONS AS TO THE CHARACTER OF REAL PROPERTY.

Circuit Court of Cuyahoga County.

J. A. C. GOLNER V. GEORGE LUTTNER.

Decided, May 22, 1912.

Fraud—Measure of Damages in Exchange of Properties.

The measure of damages in an action for fraud in the exchange of property is the difference between the value of the thing received, if it had been as represented, and its actual value at the time of the exchange.

Hidy, Klein & Harris, for plaintiff in error.*David & Heald*, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

This was an action to recover for an alleged fraud practiced upon Luttner by Golner in inducing Luttner to exchange his property in Cleveland, worth about \$7,000, for some notes secured by mortgages on land in Lorain County, which Golner and his associates, or alleged fellow-conspirators, represented to be upon the shore of Lake Erie and ample security for the notes, whereas the lots described in the mortgages were not upon the shore of the lake and were not good security for the notes. There were other misrepresentations alleged to have been made.

The case was tried to a jury, which brought in a verdict for the plaintiff, and we have reviewed the evidence upon a claim by plaintiff in error that the verdict was not sustained by sufficient evidence in two particulars—that is, that it was not shown that Luttner was deceived by any false representations made as to the location of the land, if any were made, for he had opportunity from a plat to ascertain that the lots mortgaged were not located upon the shore of the lake, and that Golner's connection with the fraud was not shown.

There is no need to recite the facts in this case—counsel for the parties are familiar with the record. It unfolds a tale of

apparent fraud. Though there are some contradictions in the evidence, this is not unusual.

Suffice it to say that if the jury believed some of the witnesses and disbelieved others, as they had a right to do, and considered all the probabilities of the case, the age, business and capacity of the parties, they might well have come to the conclusion that Luttner had been wronged by Golner in the manner claimed in the petition and was entitled to damages.

It is claimed, however, that the case must be reversed for error in the charge on the measure of Luttner's recovery if the jury should find in his favor. On this subject, the court charged as follows:

"If from a consideration of all the testimony your verdict is for the plaintiff against the defendants, or either of them, you will award to the plaintiff such amount as will compensate him for any damages he has sustained; and in arriving at the proper measure of recovery, in case your verdict is for the plaintiff, you will take into consideration the difference, if any, between the value of the securities, consisting of notes and mortgages transferred to the plaintiff, and what would have been the value of the same at the time they were transferred, if the lots covered by said mortgages had been located on or near to the shore of Lake Erie."

Plaintiff in error claims that the court should have charged that the measure of damages in a case such as this is the difference between the actual value of the thing parted with and the actual value of the thing received.

There is respectable authority for the rule contended for, but it seems that it makes a new contract for the parties. One may trade his property for another's because he expects to make a good bargain and a profit, and would make a decided profit if the thing traded for were as represented; by reason of the false representations, however, he receives something worth less, instead or more than what he parted with. The rule urged cuts out the profit he had a right to expect and remits him to the actual value of what he parted with.

Both the rule given by the court and the rule contended for are given in 20 Cyc., 132, with authorities sustaining each. In a note giving cases purporting to sustain the rule as given by the

1914.]

Lucas County.

trial judge is cited the case of *Linerode v. Rasmussen*, 63 O. S., 545, a case very similar to the one at bar. There it was held:

“Where the defendant was sued on notes given for purchase money for a farm, and sought to recoup damages on the ground that the plaintiff had represented that ‘underlying said premises was a three or three and a half foot vein of good bituminous, minable coal,’ whereas there was no coal whatever under said premises, the measure of damages is the difference between the value of the farm as it was represented to be and its actual value at the time of the purchase.”

From this authority we conclude that there was no error in the charge given.

See also *Wilkinson v. Root*, Wright, 686.

On the whole record it seems that substantial justice was done in this case, and the judgment is affirmed.

TO PREVENT DECEPTION IN THE SALE OF MILK.

Circuit Court of Lucas County.

GEORGE O. JURY V. STATE OF OHIO.

Decided, March 16, 1912.

Constitutional Law—As to Provisions for Protection of the Public Health and Detection of Offenses Thereunder.

Section 13169, General Code, relating to the filling and refilling of milk bottles and glass jars, is not repugnant to any constitutional provision and is a valid enactment.

Byron F. Ritchie, for plaintiff in error.

Holland C. Webster and *Lawrence F. Conway*, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the Court of Common Pleas of Lucas County.

This is a proceeding in error to reverse a judgment of the court of common pleas, affirming a conviction of the plaintiff in error in the police court of the city of Toledo. George O. Jury

was charged in the police court with the violation of Section 13169, General Code, on the 23d day of June, 1910. The only question argued in this court is the constitutionality of the section of the statute to which reference has just been made; it not being contended but that Jury was rightly convicted if the statute is constitutional. The section reads as follows:

“Whoever fills or refills with milk, cream or other milk product, a glass jar or bottle having the name of a person, firm or corporation blown therein, with intent to sell such milk, cream or other product, shall be fined not more than one hundred dollars. This section shall not apply to a person, firm or corporation whose name is blown in such glass jar or bottle or an authorized agent or employe thereof.”

It will be conducive to a better understanding of the objects and purposes of this statute to refer briefly to its history. The original statute was enacted on May 9, 1908, and is found in 99 O. L., 454; the title of the statute being “An act to regulate the filling and re-filling of milk bottles and glass jars.” This act contained three sections; the first section being substantially the same as is now found in Section 13169 of the General Code. The second section of the act is now Section 12730 of the General Code. This act was amended, 100 O. L., 17, but only for the purpose of correcting an error in that portion providing a penalty. Under the classification adopted by the commission to codify the laws, Sections 1 and 2 of this act have become widely separated in the General Code, but the purpose and object of the two sections was clearly to prevent deception in the sale of milk, and to thereby aid in the preservation of the public health, and to render easier a conviction of those who sell impure milk or milk or the products thereof placed in bottles which have not been cleansed and sterilized.

Section 12730 of the General Code is found under Chapter 6 devoted to offenses against public health; while Section 13169, General Code, is found under Chapter 16, which covers the subject of frauds. The species of fraud, however, to which this latter section is referable, is of such a character as relates to the public health and the detection of offenses against the same.

1914.]

Lucas County.

Counsel for plaintiff in error contend that the section in question in this case is unconstitutional on authority of *State v. Schmuck*, 77 O. S., 438. The act which was in review in that case was plainly repugnant to the Constitution by reason of provisions which are not found in Section 13169. The Supreme Court in the opinion in that case delivered by Judge Price said (page 454):

"It is manifest that the general public has not been offended by the commission of the acts alleged in the indictment, nor does the statute in question make criminal any act in which the general public is concerned."

The court said further upon the same page:

"The statute is not aimed at the adulteration of any merchandise, food or beverage, nor does it appear from its terms that a compliance with it will tend to prevent adulteration, or to secure to the public pure 'merchandise,' pure 'food' or pure 'beverages.' Its sole purpose seems to be the protection of the owners of certain described articles of personal property."

The differences between the act so under review and the section of the General Code which we are considering are so manifest as to render further reference to this case unnecessary. The statute we have under consideration is more nearly parallel to the one considered by the Supreme Court in *State, ex rel, v. Capital City Dairy Co.*, 62 O. S., 350. I cite also *Walton v. Toledo*, 3 C.C.(N.S.), 295.

Having no doubt of the constitutionality of the section, the violation of which was charged in the affidavit filed against the plaintiff in error, and being fully convinced that it is a valid and constitutional enactment, the judgment of the court of common pleas will be affirmed.

VALIDITY OF THE EXECUTION OF A WILL.

Circuit Court of Cuyahoga County.

EDNA GIDDINGS V. GEORGE SCHMUCK, AS EXECUTOR OF THE LAST
WILL AND TESTAMENT OF WILLIAM GABLE, DECEASED, ET AL.

Decided, May, 1912.

Wills—Signature to Will.

A will is signed at the end thereof, as required by the statute, when the signature of the testator appears after the will, just below a line intended in a blank form for the signature and in a blank space in the attestation clause intended for the name of the testator as part thereof, said name also appearing in the attestation clause, in the handwriting of the scrivener of the will, just below the testator's signature in such position as to be read as a part of said attestation clause. *Sears v. Sears*, 77 O. S., 104, distinguished.

C. W. Toland and H. G. Shaibley, for plaintiff.

M. P. Mooney, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

A writing purporting to be the last will and testament of William Gable, deceased, was admitted to probate by the probate court of this county on the 26th day of January, 1909. Proceedings were brought in the court of common pleas to set aside this will, with the result that on motion, the court directed the jury to find a verdict that the purported will was in fact the will of said deceased. It is to reverse this judgment that the present proceeding is prosecuted.

The parties here are as they were in the court below, the defendants being the proponents of the will.

Pursuant to the provisions of Section 12085 of the General Code, the proponent offered in evidence the will, or order of probate, including the testimony taken in the probate court by the defendant's witnesses, and rested. Thereupon the contestors of the will moved the court to direct a verdict that this writing was not the will of said testator. This motion was overruled, and

1914.]

Cuyahoga County.

then the motion, already mentioned, was made by the proponents of the will that a verdict be directed finding for the proponents.

The only question in the case is as to whether the writing claimed as a will was executed in accordance with Section 5916, which was the statute in force at the time this will purports to have been executed. That section requires that wills, except nuncupative wills, "shall be signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party by two or more competent witnesses who saw the testator subscribe or heard him acknowledge the same."

The present statute, General Code, 10505, has practically the same provision, although the wording is somewhat different, but this case must be governed by the statute in force at the time the will was executed, although, as already said, the present statute is practically the same, and if the case were to be governed by the present instead of by the former statute, the result would be the same.

The real question in the case is whether this writing was signed at the end thereof by the maker.

The attesting witnesses swore in the probate court that it was signed by William Gable in their presence, and that all the other formalities were complied with as the statute requires, and we are brought to the inquiry whether the writing itself contradicts this evidence.

The writing is in the usual form of a will, making various bequests and nominating an executor, and then is followed by these words: "In testimony whereof, I have set my hand to this my last will and testament at Cleveland this 22day of September, in the year of our Lord 190Eight."

Then follows a blank line, thus: "....." evidently intended to indicate where the testator should sign, but there is no writing on this line. Then follows the following in print:

"The foregoing instrument was signed by the said
..... in our presence, and by him published and de-

clared as and for will and testament, and at request and in presence, and in the presence of each other, and we hereunto subscribe our names as attesting witnesses at this day of A. D.”

And then follows in writing the names of two apparently attesting witnesses, they being the names of the witnesses who testified as to the execution of the will in the probate court at the time it was admitted to probate.

Filled in the first blank in this printed form appear, in writing, the words, “William Gable,” and then, almost immediately under these written words and between the first and second lines of this printed form, appear again in writing the words, “William Gable,” and the other blanks are filled out with the pronouns “him” and “his” respectively and after the word “at” is the written word “Cleveland,” and after the word “this” is “22,” and after the words “day of,” is written the word “September,” and after the letters “A. D.,” the figures “1908.”

Since it appears by the testimony of the attesting witnesses taken in the probate court, that they saw William Gable sign this will, it follows, since there is no place where his name appears that could be a signature to the will, except the two places already indicated, that William Gable either wrote his name in the blank left in the printed form on the first line, or he wrote it at the place where it appears between the first and second lines; one or the other of these must be his signature. It is difficult to present in words just how this appears on the instrument itself, but it is clear, by an inspection of the instrument, that in one place where this name “William Gable” appears, it is intended to be read in connection with the printed form, and that it is so intended to be read in but one place in such printed form. If the words were erased where they appear in the first line, there can be no doubt that those words, as they appear between the two printed lines, would be read in connection with the first line, and so read, the words as they appear in the first line, if restored, could mean nothing but a signature of William Gable; but if they are left in the first line, then the place where they appear between the two lines

1914.]

Cuyahoga County.

must mean nothing except that they are the signature of William Gable, so that in either case, we have an instrument, in form a will, and following that we have the signature of William Gable.

From an inspection of the handwriting, we have little doubt that the words "William Gable" appearing in the first line were written by him. The second place where the name appears seems to be in the handwriting of him who wrote out the body of the will, which leads us to the conclusion that the words written in the first line of this form for the attesting witnesses were written by William Gable, and we still have the complete sentence for the attesting clause. We think, therefore, that this writing is clearly shown to have been signed by William Gable at the end thereof.

It is urged on the part of the plaintiff in error that the case must be governed by the case of *Sears v. Sears*, 77 O. S., 104. In that case the name of the testator, Arminda S. Nicholson, appears in the same place as the name of William Gable appears in the first line in the attestation in the case before us, and it was held, although it was shown that this name was written by the testator, that it was not a signature at the end of the will. In speaking of this the court said, at page 127:

"The attestation clause signed by the witnesses, recites that 'the foregoing instrument was signed by the said Arminda S. Nicholson in our presence,' but this does not change the fact, and in the absence of a signature, is without legal effect. If a scrivener had prepared the will and had written her name where it appears in the attestation clause, her name there would have been merely *descriptio personae*; and when it is shown that the testatrix was her own scrivener, the natural presumption is that it was so intended; and even if the fact was that the testatrix wrote her name there, intending by that act to sign her will, still her signature would not be at the end of the will, and her intention could not have the effect of transposing it."

It must be remembered that in that case the name appeared but once, and necessarily, therefore, was to be read as a part of the attestation clause, whereas, here it appears twice, and the name can be read but once as a part of the attestation clause.

We think, therefore, that it materially differs from the case cited in that the attestation clause is complete without reading what purports to be the signature, and this coming after the will, as already said, we hold to be a signing at the end of the will, and the judgment of the court of common pleas is affirmed.

RIGHT OF APPEAL IN MUTUAL BENEFIT SOCIETIES.

Circuit Court of Cuyahoga County.

THE ST. JOHN NEPOMICINE SOCIETY V. JOSEPHINE ZOULEK,
GUARDIAN OF JOHN ZOULEK.

Decided, May 27, 1912.

Mutual Benefit Society—Appeal Within the Order—When None Provided—Jurisdiction on Appeal from Justice Court—Interest Claimed for First Time in Common Pleas Court.

1. While a member of a mutual benefit society claiming to be entitled to the payment of sick benefits from it, which are refused, must first seek his remedy for such refusal before the tribunals of the order provided for deciding such claims, still, if the society has provided no method whereby a member whose claim has been rejected may obtain a review of the decision and no tribunal for the hearing of an appeal from such decision such member may sue on his claim in the civil courts.
2. Where the only regulation with regard to appeals in the constitution and by-laws of a mutual benefit society is as follows: "As a sign that a member should be punished for a transgression of the society's or the union's constitution either for indecent or immoral conduct by a jury or by the constitution alone, or by the vote of the members, he has no right to arise against the society except by an appeal to the union," there is no provision with regard to an appeal from a refusal to pay sick benefits.
3. Where suit is brought in a justice court for \$202 without interest upon appeal to the common pleas court and trial there on a petition asking judgment for \$202 and interest, if no objection is made to the claim for interest until after judgment in the common pleas court, the cause will not be reversed because verdict and judgment included such interest.

Kerruish, Kerruish, Hartshorn & Spooner, for plaintiff in error.

Hart, Canfield & Croke, contra.

1914.]

Cuyahoga County.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

This proceeding in error had its inception in an action started by the defendant in error, as guardian of John Zoulek, against the plaintiff in error, in the court of a justice of the peace, to recover certain sick benefits claimed to be due from the plaintiff in error. The case was appealed to the court of common pleas and a verdict there rendered in favor of the plaintiff in the action for \$299.46. A motion for a new trial was overruled, and judgment entered on the verdict. The plaintiff in error is here seeking a reversal of this judgment.

The St. John Nepomicine Society is a mutual benefit association, the members of which are entitled to receive sick benefits upon the terms and conditions prescribed by its constitution and by-laws. That part of its constitution and by-laws dealing with sick benefits is found in Article XV, which is as follows:

“BENEFITS IN CASE OF SICKNESS.

“1. Each member, who is a member for six months after his admission, will in case of sickness receive weekly sick benefits of such amount as the society is then paying provided that he has all his lawful dues paid up and is adjudged worthy of the sick benefit. No sick benefits shall be paid for less than seven days, counting from the day when his application was presented to the financial secretary.

“2. The society shall decide the amount of this sick benefit at a regular meeting, according to conditions, which decision shall be a part of the minutes and shall hold good until according to new conditions this is changed. For the change of this amount will be required a two-thirds vote of the entire membership.

“3. If a member is afflicted with sickness of long duration he shall receive sick benefits for one year; after which time it ceases, and only by good will and decision of the society he shall be supported by voluntary contributions. Each member, during his membership is entitled to sick benefit for an aggregate time of one year. If a member draws sick benefit for 52 weeks he will in case of another sickness be debarred from further support.

“4. If a member falls sick owing to bad or immoral life, such as drunkenness, staying out late at night, and such, he shall not receive sick benefit in case of sickness.”

John Zoulek, the ward of the defendant in error, on or about the 1st day of September, 1903, was a member of the society. At about that time he became insane, and has remained in this condition ever since. The defendant in error was appointed his guardian, and as such made application to the society for the payment of sick benefits on account of the sickness of John Zoulek. The society, however, after investigation, refused the application on the ground that Zoulek's condition was due to drink, and, according to the contention of the society, his case came under Section 4 of Article XV of the constitution and by-laws already quoted.

After the refusal of the society to pay any benefits suit was brought in the manner and with the result above indicated. The plaintiff in error contends that on the evidence, the defendant in error was not entitled to recover on the claim sued on, for the reason that she had not exhausted her remedies in the order or association, and that the verdict was therefore either not sustained by sufficient evidence, or was contrary to law.

It is undoubtedly the law that when a member of such an organization as this society, claims to be entitled to sick benefits, he must seek his remedy in the first instance in the organization and before the tribunals provided by it for deciding such claims. *Myers et al v. Jenkins, Admr.*, 63 O. S., 101.

However, if the society has provided no method whereby a member whose claim has been rejected by it, may obtain a review of the decision and no tribunal for the hearing of an appeal from such decision, the member whose claim has been rejected may sue for the recovery of the same in the civil courts.

The defendant in error did not make any appeal within the society from the rejection of her claim, and this leaves for determination the question whether any such appeal was required under the laws of the organization.

It is provided by Section 1 of Article XXI, in substance, that each member who is admitted to the society is required to sign his name to the constitution as a sign that as a member, he acknowledges the constitution and the constitution of the union as the law of the society, and will be guided by the rules

1914.]

Cuyahoga County.

therein contained, and will fulfill all his duties and observe all laws thereof.

Section 2 of Article XXI of the constitution of the society provides:

“As a sign that a member should he be punished for a transgression of the society’s or the union’s constitution either for indecent or immoral conduct, by a jury or by the constitution alone, or by the vote of the members, he has no right to arise against the society except by an appeal to the union.”

Section 1 and 2 of Article XVIII of the constitution are as follows:

“1. Should a member be dissatisfied with the finding of the jury or the society’s decision, he may appeal to the union.

“2. The appeal must be handed to the local president within at the most 20 days, and must contain definite reasons for complaint, when and how he was unjustly treated by the society.”

It is claimed that by virtue of these provisions, the defendant in error was required to appeal to the union, but no mention is made of the subject of sick benefits in any of the sections of the constitution referred to, and, in our opinion, they do not refer to such benefit.

The appeal from the finding of the jury or the society’s decision to the union, that is provided for, apparently refers to any punishment for a transgression of the society’s or union’s constitution, and it can hardly be contended that the refusal to pay sick benefits is a punishment for a transgression of the constitution of the society or of the union, even though the refusal be based upon the claim that the member asserting his right to benefits has, by his own immoral life, produced his sickness.

No appeal having been provided whereby the defendant in error could obtain a review of the action of the organization in refusing to allow her application for benefits, it follows that she had the right, upon the rejection of her claim, to institute a suit to recover them.

Error is also claimed to have been committed by the trial court in refusing to receive in evidence a certain letter and the minutes of certain meetings of the society.

The bill of exceptions contains no intimation of what the contents of this letter or of the minutes offered may have been. There was no offer made to prove their contents, so that we are unable to pass upon their competency. No prejudicial error in the ruling of the trial court on matters of evidence has been brought to our attention.

Another ground of alleged error is founded upon the contention that the court erred in charging the jury in that part of the charge in which the court, in substance, told the jury that the only question for their determination was whether or not intoxication or the excessive use of intoxicating liquor was the cause of the insanity of John Zoulek.

We think, however, that in the state of the pleadings and the evidence, the court was right in so charging the jury. There was no dispute in the evidence that at the time suit was brought, John Zoulek was a member of the society; that all of his dues and assessments had been paid; that he was adjudged insane about the 1st day of September, 1903, and has been insane ever since; that the society had been requested to pay the benefits sought to be collected in the suit and had refused payment.

The answer filed in the court of common pleas in the action based the refusal of the society to pay sick benefits to John Zoulek upon the ground that he had led such an intemperate life as to bring about his sickness, and in view of the undisputed facts to which attention has been called, there was no issue of fact left in the case but the simple determination of whether or not Zoulek's sickness or insanity had been caused by his own addiction to drink.

It is also claimed by the plaintiff in error that the verdict is excessive to the extent of interest on \$202 from September 1st, 1903.

The bill of particulars filed in the justice court asked for judgment for \$202 only, no mention being made of interest. The petition filed in the court of common pleas prayed, not only for judgment for \$202 but also for interest from the 1st day of September, 1903. The charge of the court authorized the jury to compute interest on such amount of sick benefits as they should find John Zoulek was entitled to have received on September 1st,

1914.]

Cuyahoga County.

1903. The amount of the verdict indicates that interest was figured on the amount of benefits to be recovered in the action.

It is claimed that there can not be a recovery for a greater amount than that sought to be recovered in the justice court. No objection, however, seems to have been made at any stage of the case to the claim for interest. The amount sought to be recovered was within the original jurisdiction of the court of common pleas. It has been held that although the cause of action asserted in the court of common pleas is entirely different from that tried before the justice of the peace, yet, if it is within the original jurisdiction of the common pleas court, that court may acquire and exercise jurisdiction on the voluntary appearance and consent of the defendant. *Wilson v. Wilson*, 30 O. S., 365.

This principle seems applicable to the case under consideration.

The petition in error contains other assignments of error, but no claim has been made with respect to any other errors than those which have already been considered, and it follows that the judgment of the court of common pleas must be affirmed.

IRREGULARITY IN OBTAINING A JUDGMENT OR ORDER.

Circuit Court of Cuyahoga County.

THE SHERWIN-WILLIAMS COMPANY v. THE GLOBE RUTGERS
FIRE INSURANCE COMPANY.

Decided, May 27, 1912.

Motion to Vacate Order Overruling Motion for New Trial—Irregularity of Court—Judicial Notice of Judge's Own Conduct—Finding of Facts—Affidavit of Good Defense Not Necessary, When.

1. Where a trial judge, upon submission of a motion for a new trial promises to let the defendant's attorneys know of the disposition of the motion, which he fails to do, but overrules the motion without their knowledge, of which action they do not learn until after time for filing a bill of exceptions has passed, this constitutes such "irregularity in obtaining a judgment or order," within the purview of Section 11631, General Code, as to authorize the court at

- a. subsequent term to vacate the order overruling the motion for a new trial and set the same for hearing.
2. On a motion to vacate an order overruling a motion for a new trial on the ground of irregularity in obtaining it, which irregularity is alleged to be an act or course of conduct of the judge, said judge in passing on the motion, may take into consideration, without other evidence, such facts as came within his own cognizance.
 3. When a journal entry embodies facts relating to the court's own action on the subject before it, which disclose on their face that they were within the knowledge of the court, such journal entry should be treated as a finding of facts, and given the same effect as though the court had been specifically requested to make a finding of fact and of law.
 4. An affidavit that the defendant has a good defense need not be filed with a motion after term to vacate an order overruling a motion for a new trial.

Squire, Sanders & Dempsey, for plaintiff in error.

White, Johnson & Cannon, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The plaintiff in error in this proceeding seeks a reversal of the action of the court of common pleas in granting a motion to vacate and set aside a former order of the court whereby the motion of the defendant in error for a new trial was overruled.

The action in the court below was for the recovery of money under an insurance policy. The trial took place at the April, 1911, term of court, and resulted in a verdict for the plaintiff on the 14th day of June, 1911.

Within three days thereafter the defendant filed its motion for a new trial, which was held by the court until December 22, 1911, in the September, 1911, term, when it was overruled, and judgment entered on the verdict. Counsel for defendant did not learn of this until the time for filing a bill of exceptions had passed.

On February 12, 1912, in the January term of that year, the defendant filed a motion to set aside the order overruling its motion for a new trial. In the same term, on the 26th day of April, the court granted this motion and set aside "the order and decision of the court overruling the motion for a new trial and the

1914.]

Cuyahoga County.

judgment entered thereon," and set the hearing on the motion for a new trial for the following day, at which time the motion for a new trial was overruled and judgment entered on the verdict.

The motion involved in this proceeding was founded on Section 11631, General Code, which among other things provides:

"The common pleas court or the circuit court may vacate or modify its own judgment or order after the term at which it was made:

"3. For mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order."

The irregularity relied upon by the defendant is stated in its motion in the following language:

"Said case was tried at the April term, A. D. 1911, of this court, and a verdict rendered. In due time thereafter, a motion for a new trial was filed by this defendant. Defendant endeavored to obtain a hearing on said motion at that time, but was unable to do so, and no hearing was had thereon notwithstanding the efforts of this defendant. At the September term of this court, this defendant made repeated efforts to obtain a hearing on said motion, and the trial judge three times served notice on attorneys for plaintiff and defendant to appear and argue said motion. On each of said occasions, this defendant appeared by counsel ready to argue said motion, but counsel for plaintiff did not appear, being engaged in the trial of other cases. On request of the trial judge, this defendant had the testimony written out, of the witness in the course of whose examination the error occurred as to which the judge was uncertain, and also the entire charge of the court written out, showing his charge in relation to this testimony, and delivered the same to the judge on the 28th of November, being a day of the September term; and at that time, the trial judge was busy trying a case in the criminal branch of this court, and stated that he was busy and unable to give the matter attention at that time, but that he would look over the testimony and the charge, and call in the attorneys for the plaintiff and defendant, so that a hearing could be had on the 28th day of November, A. D. 1911, when the testimony and charge were delivered to the court.

"Thereafter, counsel for defendant held themselves in readiness to attend upon such call, but without calling in counsel, on the afternoon of the 22d of December, 1911, the trial judge made the entry overruling the motion for new trial.

“Of this action of the court, defendant had no knowledge until the 8th day of February, A. D. 1912, being after the expiration of the time at which a bill of exceptions could be filed. As soon as defendant’s counsel learned of this, they called upon the trial judge and learned the facts as above stated.”

It is contended on behalf of the plaintiff in error that the motion charges no such irregularity as is contemplated by the statute as ground for vacating a judgment or order after term.

In *Guernsey Co. Commissioners v. Cambridge*, 7 C. C., 72, an irregularity, within the intent of the statute, was defined to be “some act done, or step taken, by the court, either *sui sponte*, or upon request, or by an officer thereof, which is not according to the regular course of proceeding, and by which a party was deprived of the benefit of a defense, without fault on his part.”

The term “irregularity” is a very comprehensive one, and was intended by the Legislature no doubt to embrace all such acts of a party to the action, an officer of the court, or of the court itself, as constitute a departure from the due, orderly and established mode of proceeding therein, where a party, with no fault on his part, has been deprived of some right or benefit otherwise available to him. Such irregularity may consist of acts of commission or omission, constituting a want of adherence to some prescribed rule or method of procedure.

If the facts set forth in the motion as the grounds for obtaining the relief sought by said motion are established by sufficient proof, they, in our opinion, make a case of irregularity within the meaning of the statute. Counsel for the defendant had a right to rely upon any statement of the court, and if through inadvertence or misunderstanding, or any other reason, they were not notified of the hearing on the motion for a new trial, and did not discover the entry overruling this motion, they have a right to invoke the benefit of the relief provided by Section 11631 of the General Code.

It is claimed, however, on behalf of the plaintiff in error, that there was a failure of proof of the irregularity complained of. The only evidence in support of the motion was the affidavit of one of the defendant’s attorneys, which, it is insisted, does not contain sufficient facts to sustain the motion.

1914.]

Cuyahoga County.

The motion itself, however, was sworn to and might properly have been considered by the court as an affidavit, as well as a motion. In hearings in which affidavits are admissible, it is common practice to receive and consider the sworn pleadings and motions as evidence. Moreover, on the journal entry the court makes certain findings of fact which in their very nature must have rested within his own personal knowledge. These findings of fact by the court, based upon his knowledge of what took place with reference to the making of the entry overruling the defendant's motion for a new trial, are sufficient to sustain the motion when considered with the affidavit offered in support of said motion and the sworn motion itself. The nature of the findings of fact based upon the court's personal knowledge is sufficiently indicated by the following language:

"In view of any promise to let the defendant's attorneys know of the disposition of the motion, and in view of the further fact that, in spite of effort, the knowledge was not brought home to them, and they were misled by my promise, it is my opinion that the motion should be granted, and the judgment be set aside, and the motion set for hearing."

That the court had the right to consider and take into account the facts that rested within his own personal knowledge, we think, is clear. In contempt cases it is well settled that the court may determine without other evidence facts that occur in court and which are within the court's knowledge. Thus, in *Myers v. State*, 46 O. S., 473, it was said:

"It was competent for the court to take judicial notice of pertinent facts connected with the transaction that came within the cognizance of his own senses."

When irregularity, consisting of an act, or a course of conduct of the court, is asserted as the ground of relief sought by a motion, it is competent, in passing on the motion, for the court to consider without other evidence the facts involving his own act or conduct.

An affidavit by the court, or testimony by him, would be useless, and when the journal entry embodies facts relating to the court's own action on the subject before him, which disclose on

their face that they were within the knowledge of the court, such journal entry should be treated as findings of fact, and given the same effect as though the court had been specifically requested to make a finding of fact and of law.

Unless, therefore, the contention of the plaintiff in error, that an affidavit of merit must be filed with the motion to vacate the judgment or order, is to be sustained, the ruling of the court below on the motion under consideration must be affirmed.

We do not think the requirement that such affidavit be filed is applicable to the hearing of a motion of this kind. It was intended to apply in those cases where a party has been prevented from making a defense on the merits, as in cases of default judgments.

The language of the Supreme Court in *Knox Co. Bank v. Doty*, 9 O. S., 506, is in accord with this view. It was there said:

“Section 538 of the code which provides that a judgment shall not be vacated on motion until it is adjudged that there is a valid defense to the action, was intended to apply to cases where the ground of the motion is that the party had a defense, which he, for some cause, was prevented from setting up, and not to cases where, as in the case at bar, there is confessedly no such cause of action, or where the court had no jurisdiction over the person of the defendants.”

It follows from the views here expressed that the judgment of the court of common pleas must be affirmed.

1914.]

Butler County.

**CONNECTION BY ABUTTING OWNER WITH A
PRIVATE SEWER.**

Court of Appeals for Butler County.

ROBERT A. BRADLEY V. JACOB SCHWAB.

Decided, May, 1914.

*Sewers—Injunction Against Use by Abutting Owner of Private Sewer
Does Not Lie, When.*

Connection with a private sewer will not be enjoined on the claim that the sewer will be overloaded thereby, unsupported by evidence that plaintiff has suffered damage or that such a result as that complained of will follow.

M. O. Burns, for plaintiff.*Clinton Egbert*, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

This case was brought in this court on appeal. It is an action by Robert A. Bradley seeking to enjoin Jacob Schwab from maintaining a sewer connection with a line of sewer pipe built by plaintiff's predecessor upon a ten foot strip of land in the rear of the lots of both parties, which connects with the pipe sewer the premises of plaintiff and also the premises of defendant which lie north of plaintiff. Defendant owns property which lies north of plaintiff's and also property south of plaintiff, which latter is a corner lot and abuts upon the alley in which is placed the public sewer to which the connection is made.

The fee of this ten foot strip is vested in the defendant, but it is subject to an easement for ingress and egress appurtenant to the property of plaintiff. This five inch private sewer was built by plaintiff's predecessor in title to drain his premises, and plaintiff is entitled to its use and to have it maintained in its present position. The sewer connection to the lot on the north has also existed for some time, and defendant is entitled to maintain it.

The question presented to the court arose at the time defendant undertook to connect a watercloset constructed in a shop in the rear part of his lot lying south of plaintiff. Plaintiff contends that such connection would overburden the private sewer and therefore interfere with his right of drainage, and, the connection having been made in spite of his protest, he seeks to enjoin its further maintenance.

We are unable to find, from the testimony, that the tap which has been made by defendant has resulted in overburdening the pipe, or has in any way obstructed or interfered with plaintiff's rights, and as the exercise of the right of injunction requires clear proof of the existence of the injury complained of, the court should not exercise its prerogative of interference so long as no injury has been suffered by plaintiff.

The petition will therefore be dismissed at plaintiff's costs

**EFFECT OF REFUSAL OF JUDGE TO MAKE FINDINGS OF
FACT AND LAW.**

Court of Appeals for Hamilton County.

AARON STRAUSS V. NATHAN FRIEDMAN ET AL.

Decided, March 15, 1913.

Prejudicial Error—Statutory Right Denied by Refusal to Make Proper Findings—Sections 11469 and 11470.

1. It is mandatory upon a trial judge to make, when so requested, a special finding of fact separately from the conclusions of law, and his refusal so to do constitutes prejudicial error.
2. The statutory rights of a party to such a finding is in no way affected by the fact that his counsel sat silent at the opening of the trial, when the judge announced that he would consent to proceed with the trial of the case without a jury only on condition that he should not be asked to prepare a finding of fact and conclusions of law.

Louis P. Pink and W. A. Hicks, for plaintiff in error.
Closs & Luebbert, contra.

1914.]

Hamilton County.

JONES, E. H., J.; JONES, O. B., J., concurs; SWING, P. J., dissents.

The controversy between parties to this action arose over a building contract.

When the case was reached for trial in the common pleas court the parties consented to trial without a jury.

The judgment entry of May 29th, 1912, describes the action of the trial judge, of which plaintiff in error complains, as follows:

“Such parties requested the court to determine the issues raised by such pleadings without intervention of a jury. The court consented so to do, provided such parties asked for no separate findings of fact and conclusions of law. Neither party at such time asked for such separate findings, and the court upon the pleadings and upon the evidence offered on the 7th day of May, 1912, found for the plaintiff, and that there was due to said plaintiff from the defendant, Aaron Strauss, the sum of \$651. Thereupon within three days the defendant filed his motion for a new trial, which was overruled; and thereupon the defendant having requested separate findings of fact and conclusions of law, which request the court refused.”

In another entry made May 29th, 1912, the court said:

“This cause coming on to be heard on the request of the defendant, Aaron Strauss, for a separate finding of fact and law filed herein, on consideration thereof the court overrules and refuses the same for the reason that at the beginning of the hearing of the action the court stated that it would try and determine the case as between plaintiff and defendant, Aaron Strauss, and render a verdict the same as a jury without any separate findings of fact or law and counsel for neither party made any objection thereto.”

It is urged, as the sole ground of reversal, that the refusal of the court to make a special finding of fact separately from conclusions of law was without authority in law and prejudicial to the rights of plaintiff in error.

It seems to us that the question thus presented must be determined from an examination of the Ohio statutes on the subject and rules of practice not inconsistent therewith.

Sections 11469 and 11470, General Code, provide as follows:

11469. "In actions arising on contract the trial by jury may be waived by the parties and in other actions with the assent of the court," etc. * * *

11470. "When questions of fact are tried by the court, its finding may be general for the plaintiff or defendant, unless with a view of excepting to the court's decision upon questions of law involved in the trial one of the parties so requests, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

The latter section fixes no time at which the request for a separate finding is to be made. It is mandatory upon the court and the right conferred upon the parties is an important and substantial one.

The trial judge was powerless to impose any condition upon the parties as, under Section 11469, his consent to try the case was not necessary. Such being the law we do not see that the silence of counsel when the proposition of the judge was made can weigh against the statutory right of the parties.

It is said that the decision of the court was indorsed on the petition, on May 7th. There is nothing on the appearance docket to show this fact. Motion for a new trial was filed on May 9th and on May 14th, five days after, the request for separate findings was made. This was fifteen days before the overruling of the motion for a new trial.

While it was not claimed by the lower court as a ground of refusal that the request was too late, we refer to these dates because it is claimed in argument here, that the request should have been made at the commencement of, or during the trial. This claim is not supported by law, by practice or by rules, in force at the time, of the court in which the cause was tried.

Decisions of courts in other states are cited which do not aid in the interpretation of our statutes and which, so far as we have examined them, are based upon different statutory provisions or established rules differing from those in vogue here.

It is argued by counsel for defendant in error that we can not reverse the judgment on the error assigned, there being no bill of exceptions containing the evidence from which to find that the plaintiff in error was prejudiced by the judgment.

1914.]

Hamilton County.

In support of this contention the case of *Oxford Twp. v. Columbia*, 38 O. S., 87, is cited. In that case the court held that it was error to refuse the request for a finding of fact but affirmed the judgment nevertheless, on the ground that the bill of exceptions in the case showed that the judgment was right, based upon the facts as therein disclosed.

But, there is no transcript of the evidence in this case. The chief purpose of a finding of fact is to avoid a long bill of exceptions. To say that when a party to a cause is denied a right given by statute to avoid a bill of exceptions, he must then prepare a bill in order to show prejudice by such denial, seems to us unreasonable if not absurd.

Were there a bill of exceptions in the case under consideration the case cited would require that we examine it to see if the error committed were prejudicial, but nothing in the opinion in that case can possibly be construed to hold or even intimate that before a party can be heard to complain of a court's refusal of a substantial right he must cause a record of all the evidence in order to show prejudice.

As well might it be claimed that if the court had refused a request for a jury by a party to this action, such party would have to sit through the trial, produce his evidence and go to the expense of transcribing it in order to get redress in a reviewing court.

For the reason stated the judgment is reversed and cause remanded for a new trial.

**BANKRUPTCY PROCEEDINGS BY DEBTOR PENDING APPEAL IN
ACTION AGAINST HIM.**

Circuit Court of Cuyahoga County.

MARK KLEIN v. ABE SOLOMON ET AL, PARTNERS AS ABE
SOLOMON & BROTHER.

Decided, June 3, 1912.

*Bankruptcy Pending Appeal—Appealed Case May Proceed to Judgment
Against Bankrupt, But Execution Enjoined.*

Where, pending an appeal of a judgment against him, the judgment debtor becomes a bankrupt upon his own petition and is discharged from the payment of his debts, the appeal can still be prosecuted for the purpose of fixing the liability of the sureties on the appeal bond, but execution of judgment in the appellate court against the bankrupt should be perpetually enjoined.

White, Johnson & Cannon, for plaintiff in error.
Patterson & Austin, contra.

MARVIN, J.; NIMAN, J., concurs.

Suit was brought by the Solomons against Klein before a justice of the peace, in which the Solomons recovered judgment. Thereupon Klein appealed to the court of common pleas, giving a bond therefor with surety, as provided in Section 10383 of the General Code, the condition being, as provided in section, "That appellant will prosecute his appeal to effect without unnecessary delay, and that if on the appeal judgment be rendered against him, he will satisfy it and the costs."

While the case was pending in the common pleas court on the appeal, Klein became a bankrupt on his own petition, and obtained his discharge in the bankruptcy court from the payment of his debts. He then filed a supplemental answer in the appealed case setting up such discharge.

Both the plaintiff and the defendant made motions to the several pleadings filed by the adverse party, on which the court passed, and the case finally went to trial before a jury. At the close of the evidence the court directed a verdict for the plaintiff.

1914.]

Cuyahoga County.

There was no error in this, unless the discharge of the defendant in bankruptcy constituted a defense to the action, and precluded the plaintiff from any right of recovery.

In the schedule of debts filed in the bankruptcy proceedings the claim of Solomon was listed, due notice of the bankruptcy proceedings was given to Solomon, and his claim was one provable in bankruptcy and was not among such claims as are not relieved against by a discharge in bankruptcy.

The order of the court in the bankruptcy proceedings was that "Mark Klein be discharged from all debts and claims which are made provable by said acts" (the acts of Congress relating to bankruptcy), "against his estate which existed on the 31st day of May, 1911." The claim of the Solomons existed at that time.

It is admitted that upon the judgment rendered in this case, no property of Klein could be taken in execution to satisfy such judgment, even though no order on that subject had been made in the case, but to remove any doubt about it, the court said in its judgment: "It is ordered that execution against said defendant, Mark Klein, be and the same is perpetually enjoined."

If this order had not been made, there would seem to be no doubt that if execution were issued and levied, Klein would have been entitled to an injunction to prevent its being carried into effect, because, by his discharge in bankruptcy, his property, except such as had been taken by the trustee in bankruptcy, was relieved from being taken to pay his debts.

Since, then, nothing could be taken from Klein to satisfy this judgment, it might be questioned whether he was prejudiced by it, and so whether the court should reverse it, even if it was found to be erroneous. However, it is not necessary to decide this question in order to reach a right conclusion in the case, as we view it.

The object of the Solomons in securing the judgment was, of course, to enable them to proceed against the surety on the appeal bond, for the bond, by its terms, only requires the surety to pay such judgment as shall be recovered against Klein. That the question presented in this case would be attended with grave difficulties, were it not settled by the courts of this state, can not be denied, but we regard it as so settled.

In the case of *Sigler v. Shelby*, 15 Ohio, 471, it is said: "After the appellant has become a certified bankrupt, no decree or judgment can be rendered against him." If this were the last utterance of the court on the subject, it would seem to settle the present case in favor of the contention of counsel for Klein, but it is not the last holding of the court.

In the case of *Farrell v. Finch*, 40 Ohio State, 337, it is said:

"Ruan in an action before a justice of the peace recovered a judgment against Clarkson, and Farrell became surety for the appeal of the action to the court of common pleas.

"While the case was pending in the common pleas court, Clarkson obtained a discharge in bankruptcy; *Held*: That while the discharge of Clarkson suspended all remedy against him for the collection of his debts, it did not release Farrell from liability on the undertaking for appeal."

Little as is said in the report of this case, for the foregoing quotation gives the entire report, so long as it remains undisturbed it settles the question that somehow this surety, in a case like the present, can be held on the bond, and this, taken in connection with the last head-note of *Sigler v. Shelby*, *supra*, would seem to settle the question that judgment could be entered against the bankrupt principal. That head-note reads:

"To charge the bail, a judgment or decree must be rendered against the appellant personally, and an execution against him have been returned *nulla bona*."

In the case of *The Sleepy Eye Milling Co. v. E. M. Walsh*, 14 C.C.(N.S.), 509, it is held, in an opinion announced by Judge Henry, that for the purposes of that case a judgment might be taken against a discharged bankrupt debtor, for the purpose of fixing the liability of the sureties upon his bond given for release of attached property, and upon bond given in appeal.

It is urged here that the matter really under consideration in that case was whether such judgment could be taken for the purpose of fixing liability upon the sureties on an attachment bond.

We do not recognize a distinction between the two kinds of bonds, viz., appeal bonds and attachment bonds, which could affect the question here under consideration. If no judgment can

1914.]

Cuyahoga County.

be taken in any case against the bankrupt, then no surety on either kind of bond could be made to respond, where a discharge in bankruptcy had intervened. Not only so, but the conditions of the two bonds are too nearly akin to warrant any distinction in regard to the liability of the surety to respond.

The condition of the appeal bond is that "If on the appeal judgment be rendered against him" (the appellant) "he will satisfy it and the costs." G. C., 10383. The condition of the bond in attachment is "That the property or its appraised value in money will be forthcoming to answer the judgment of the court in the action." G. C., 10258.

The judgment of this court in the last named case was affirmed without report on June 20, 1911, as appears by 84 Ohio State, 495.

We reach the conclusion in this case, therefore, that the judgment should be and the same is affirmed.

COMPETENCY OF EVIDENCE IN A RAILWAY CROSSING ACCIDENT CASE.

Circuit Court of Cuyahoga County.

EMILY DAVIDER v. THE WHEELING & LAKE ERIE
RAILWAY COMPANY.

Decided, May 27, 1912.

Railroad Crossing Accident—Obstruction of View—Evidence—Ordinance Limiting Speed of Train.

1. In a railroad crossing accident case, a witness who has made an inspection of certain premises for the purpose of discovering whether certain buildings obstructed the view from a given point along the line of a railroad track, may testify that they do or do not obstruct the view, but where an objection to such evidence is sustained and the court thereafter permits the exact situation, with location and dimensions of buildings with reference to the track to be given to the jury, from which it may readily conclude whether or not the view was obstructed as claimed, no prejudice results from the exclusion of the witness' answer to the first question.

2. So also with regard to the plaintiff's own statements that her view was obstructed by certain objects, at the time of the accident when she was about to cross the track.
3. It is competent on cross-examination of plaintiff in such case to ask her if she knew of a village ordinance limiting the speed of trains at the place where she was injured.

A. W. Lamson, for plaintiff in error.

Squire, Sanders & Dempsey, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

The parties here are as they were in the court below. The plaintiff brought suit against the Pennsylvania Company, and later by amendment of the petition, the present defendant in error was made a party defendant. The purpose of the action was to recover for injuries received by the plaintiff on the 31st day of May, 1907, when driving in a one-horse buggy across the track of the Pennsylvania Company on Grace street, in the village of Bedford, in this county.

At the close of the evidence introduced by the plaintiff, the court directed a verdict for the defendant, the Wheeling & Lake Erie Railway Company. Verdict was accordingly rendered and judgment entered on such verdict, dismissing the petition as against said last named defendant. By proper proceedings, the action of the court in that regard is here for review.

The tracks of the two railroad companies run nearly parallel to each other, and the direction is nearly south and north. Grace street, on which the plaintiff was driving, crosses the tracks of the two companies nearly at right angles. The locomotive on a train of the Pennsylvania Company, proceeding west, collided with the buggy in which the plaintiff was driving, resulting in injuries to her.

The distance between the track of the Wheeling & Lake Erie Railway Company and the track of the Pennsylvania Company, on which the plaintiff was injured, is something like 15 feet. The track of the Wheeling & Lake Erie Company is east of the track of the Pennsylvania Company on which the accident occurred. The plaintiff was driving toward the west and had to cross the track of the Wheeling & Lake Erie Company before

1914.]

Cuyahoga County.

reaching the Pennsylvania Company's track where she was injured. As she approached the Wheeling & Lake Erie Company's track, there was a freight train standing upon such track, and she was detained for a considerable time by reason of this train. She was finally able to drive across this track by the cutting of the train, leaving an opening sufficient between the cars to allow her to drive across the track, and she says that she was signalled by an employee of the Wheeling & Lake Erie Company to drive across.

On a side-track of the Pennsylvania Company, which was east of the track on which she was injured, there were cars standing, so that, she says, she was unable to see the train approaching on the Pennsylvania track.

The acts of negligence charged against the Wheeling & Lake Erie Company are that it failed to establish methods of warning other than by bell and whistle, at a crossing alleged to be more dangerous than the usual crossing, by reason of obstruction to view by a freight train on the Wheeling & Lake Erie passing same; freight cars on the Pennsylvania storage track, and buildings, fences and bushes erected and permitted on the rights of way of both companies. Further, that there was unnecessary blocking of the crossing by the train on the Wheeling & Lake Erie road.

One of the errors alleged in the petition is that the verdict was against the weight of the evidence; in any event, that there was evidence tending to show negligence on the part of the Wheeling & Lake Erie Company, and that there being such evidence, the court was bound to have submitted the case as between the plaintiff and the last named defendant to the jury.

For reasons explained by the court on the hearing of this case, this question can not be considered by us, and it is not necessary to discuss it further here. The evidence is not all before us, and under rulings of this court, affirmed by the Supreme Court, we have no authority to examine into the question of the facts in this proceeding.

It is urged, however, that there is error manifest in the record in the ruling which the court made upon the admission of evidence.

Attention is first called to an alleged error of this sort appearing at page 7 of the record. Frank William Karber was a witness who had been called by the plaintiff, and testified as to the location of the tracks and his observations and experiments made at the place where the accident occurred. From the evidence it appears that there was a tool house situated on the right-of-way of the Wheeling & Lake Erie Company, and it was claimed that this tool house was so situated as to render it impossible for one driving on Grace street, as this plaintiff was, to see along the track of the Pennsylvania Company for a sufficient distance to avoid collision with trains coming on that road from that direction.

After the witness had told that he had made some experiments to determine the effect that the location of this tool house had upon the view of one from Grace street along the Pennsylvania track, he was asked this question:

“What did you do?”

This was objected to by the defendant; the objection, however, was overruled by the court, and the witness answered:

“I stood on the south track of the Wheeling & Lake Erie, on the south rail of the main track, and observed that the tool house obstructed the view of the westbound track, beginning at a point about 1000 feet back and extending for quite a distance.

“Q. Back from where? A. Standing on the south rail of the main track.”

Then his attention is called to the fact that at that particular point although the general direction of the road is east and west, as it passes through this village, it runs practically north and south, and the track which is on the left hand side as trains are coming toward Cleveland, is spoken of among the railroad people as the southerly track, although at this particular point it is the westerly track.

The witness then says:

“Standing on the westerly rail I observed that the tool house obstructed the view of the west bound track, beginning at a point approximately 1000 feet back from the center line of Grace street.”

1914.]

Cuyahoga County.

The defendant moved that this answer be taken from the jury and this motion was sustained.

It is said that there is error in this, because the point which the plaintiff was seeking to make was that the Wheeling & Lake Erie Road had erected a building on its right-of-way at such a point that it obstructed the view of the Pennsylvania Road, and that therefore this was negligence on the part of the Wheeling & Lake Erie Company.

Other questions were asked of a similar nature immediately following the questions to which attention has been called, and objection to some of them being answered was sustained, and answers to others were taken from the jury.

It is urged on the part of the defendant in error that the rulings were proper because, it is said, to say that a building obstructed one's view is to state a conclusion.

We are not impressed with the soundness of this reasoning. It seems to us exceedingly technical to say that one may not testify that a building obstructed his view. However, we are unable to see that the plaintiff suffered from this ruling, by reason of what immediately followed.

The witness was asked to describe the tool house, size and height. He had already given its location, and he answered to this question as follows:

"The tool house, the side parallel with the west bound track of the Pennsylvania line was 14 feet 9 inches wide; the side at right angles was 16 feet and 6 inches wide; and the height I didn't ascertain any more than from observation, but my memory is that it was about 12 feet high."

Then he was asked to give the length of the switch of the Wheeling & Lake Erie, which he gave.

Following this he was asked this question:

"Did you make any observation to see what, if any, obstruction was created by the tool house which you described and located on this map, to a person standing at or near the Wheeling & Lake Erie tracks at Grace street?"

An objection to this was sustained, and it was stated by counsel for the plaintiff as follows:

“We expect to show that he took a position on the center line of Grace street in the easterly track of the Wheeling & Lake Erie Railroad Company, and looked south for the purpose of seeing what, if any, obstruction this tool house was to a view of the west bound track of the Pennsylvania Company, and found that the tool house cut off the view of a person, situated as he was, of the west bound track of the Pennsylvania Company, from a point about 900 feet south of Grace street in said track southerly as far as the track was in view, which was to the point where the track, by reason of the curve, passed out of the view of a person at Grace street.”

On cross-examination the witness was asked again as to the location of this tool house, and he gave it as in the direct examination.

We think that no prejudice came to the plaintiff by reason of sustaining objections to the question as to what effect the matter of the obstruction of the view of the witness this tool house had, because when the dimensions of the tool house were given, the point from which the witness looked and the situation of the track, the jury had full information that the tool house obstructed the view, so though we think that the witness should have been permitted to answer that the tool house obstructed the view, the ruling of the court in regard to it was not to the prejudice of the plaintiff; hence there can be no reversal on account of this.

At page 35 of the record it was sought to show by the plaintiff, who was being examined as a witness, that her view of the Pennsylvania track on which the train was approaching which collided with her buggy, was obstructed by freight cars standing on a track of the Wheeling & Lake Erie Company, the claim being that there was negligence on the part of this company in allowing their cars to so stand as to obstruct the view of the Pennsylvania tracks.

This question was asked the plaintiff by her own counsel:

“What effect did the train or the other cars there have on your seeing the Pennsylvania line?”

The court sustained an objection to this question. The offer to show was that the cars of the Wheeling & Lake Erie standing on this track obstructed the view of the plaintiff.

We think that the court should have permitted this question to be answered, for the same reason that we think the court should have permitted answers to the questions in reference to the effect of the tool house upon the ability to see along the line of the Pennsylvania track.

Immediately following this, this question was asked:

“When you were looking southerly along the line of the railroad tracks in front of you, were you able to see the line of the Pennsylvania Railroad?”

The court sustained an objection to that question, and proper exception was taken and an offer made to prove that she was not able to see along the line of the railroad.

However, immediately after this the following questions were asked of the plaintiff, and answered as indicated:

“Q. I will ask you, did you, while sitting there in your carriage, did you look towards the Pennsylvania Railroad tracks southerly from Grace street? A. I couldn't see the Pennsylvania track. The Wheeling & Lake Erie obstructed—the cars of the Wheeling & Lake Erie obstructed my view.

“Q. My question was, did you look toward the Pennsylvania tracks in that direction while you were standing there?”

Whereupon the court said: “The answer may stand.”

So that, the court left as an answer to go to the jury testimony of the witness that the cars spoken of obstructed her view. We think the court did right in this.

Then followed this question:

“Did you look in that direction?”

This question was objected to by the defendant, the objection was overruled, and she gave this answer:

“I looked in a northerly and southerly direction and could not see the Pennsylvania tracks.”

As all that was sought to be shown by the witness in reference to the interference with her view of the Pennsylvania track by these cars which were standing on the Wheeling & Lake Erie track got to the jury, we see no reversible error in the ruling of

the court, though we are not able to see why the court ruled out the same thing earlier in the testimony of the same witness.

Later on a similar situation arose in reference to the claim on the part of the plaintiff that her view of the approaching train on the Pennsylvania road was obstructed by cars on the track of that road, but as answers to these questions could not have affected the right of the plaintiff one way or another to recover against the Wheeling & Lake Erie, we regard it as of no importance in this connection, although, upon reading the record, we find the same situation in reference to this, that practically all that the witness undertook to say in answer to any questions was finally admitted by the court.

Again, at page 62 of the record, the plaintiff, being under cross-examination by counsel for the defendant railroad company, was asked as to her having seen the trains passing at this point frequently. She said she had, and she was asked: "About how fast an hour have you seen trains passing over that crossing on the Pennsylvania track?"

She answered: "You mean freight or passenger?"

The counsel replied: "Freight and passenger trains, both?"

Objection to this was made by the plaintiff, and it was overruled, and she answered: Freight trains about twenty or thirty miles an hour, and that she had seen that frequently.

We think this was competent as tending to show that she might have anticipated that there would be a train along at that rate of speed crossing Grace street at the point where such street crossed the track.

At page 162 of the record it is shown that the plaintiff was recalled to the stand for further cross-examination. On her part evidence was introduced of the existence of an ordinance in the village of Bedford restricting the speed at which trains might run through the village to ten miles an hour, and when she was recalled, as already stated, she was asked by counsel for the railroad company if she knew anything about that ordinance, and she answered that she did not.

Objection was made by her counsel to this question and that objection was overruled.

1914.]

Cuyahoga County.

This ruling was proper, upon the principle that she could not rely upon the provisions of an ordinance in relation to the speed of trains of which she had no knowledge.

No other questions are presented to us which affect the claim of the plaintiff against the Wheeling & Lake Erie Company. As to these, we find no error to her prejudice in the rulings of the court, and the result is that the judgment is affirmed.

VESTING OF A LIFE ESTATE SUBJECT TO THE ACCUMULATION OF A FUND.

Circuit Court of Cuyahoga County.

BENJ. F. RICE v. MINNIE M. RICE.

Decided, May 27, 1912.

Will—Interpretation of—Life Estate—Attachment.

A devise of real estate to testator's son, "to have and to hold and the use thereof during his natural life, and should his wife, Edith Rice, outlive him, then she shall have the use thereof during the remainder of her life, and at the decease of both, said property shall become and be the property of their children and their heirs forever," coupled with a direction that, "It is my will that my son, Benj. F. Rice, shall out of the income of aforesaid property, erect a monument upon the graves of myself and my husband, Jos. P. Rice, within five years after my decease, at a value not less than five hundred dollars," vests in the son a life estate in said real estate, charged with the payment or accumulation of a fund of \$500 for the building of a monument, and the son's interest in said real estate is subject to attachment.

Green, Zmunt & Zmunt, for plaintiff in error.
Sterling Parks, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The defendant in error, Minnie M. Rice, brought her action in the court of common pleas to recover from the plaintiff in error, Benj. F. Rice, on a claim for the care and support of Phyllis Rice, the minor child of said parties.

The defendant below, at the time of the commencement of the action, was a resident of Pennsylvania. The plaintiff, on affidavit in the form required by law, obtained an order of attachment on the ground that the defendant was a non-resident of the state of Ohio, and certain real estate located in Dover township, Cuyahoga county, Ohio, was attached by the sheriff pursuant to the order.

Service by publication was then obtained upon the defendant. After the completion of the publication, the defendant filed his motion to quash service on the ground that the property attached was not subject to attachment. This motion was overruled and the defendant, the plaintiff in error here, prosecutes this proceeding in error to secure a reversal of the judgment of the court of common pleas, overruling his motion to quash service.

The land attached in the action below, formerly belonged to Almeda Rice, who died in September, 1911, leaving a will which was duly probated, the second, third and fourth paragraphs of which are as follows:

“Second. I give, devise and bequeath to my adopted son, Benj. F. Rice, the mortgages which I hold against his property, to be his and his heirs’ forever and all my real estate and personal property, to have and to hold and the use thereof during his natural life, and should his wife, Edith Rice, outlive him, then she shall have the use thereof during the remainder of her life, and at the decease of both, said property shall become and be the property of their children and their heirs forever.

“Third. It is my will that my son, Benj. F. Rice, shall out of the income of aforesaid property, erect a monument upon the graves of myself and my husband, Jos. P. Rice, within five years after my decease, at a value not less than five hundred dollars.

“Fourth. I hereby appoint my son, Benj. F. Rice, executor of this my last will and testament.”

The decision of the question presented by the petition in error in this proceeding depends upon the proper interpretation of the provisions of the will of Almeda Rice, above quoted.

It is contended on behalf of the plaintiff in error that under these provisions of the will, Benj. F. Rice was to hold the property mentioned therein, which is the real estate attached, until

1914.]

Cuyahoga County.

the income for the monument shall have been accumulated; that until then Benj. F. Rice holds said real estate either as executor or testamentary trustee, and not as life tenant, and that property in the hands of an administrator or executor, as this is claimed to be, is not subject to attachment.

We think it clear, however, that the will gave a life estate to Benj. F. Rice in the real estate of the testatrix, and that such real estate was not taken by him as executor or testamentary trustee to be held in that capacity until a fund for the monument was accumulated. The real estate in question vested at once in Benj. F. Rice as life tenant, charged, however, with the payment or accumulation of the fund of \$500 for the building of a monument.

This being the case, the authorities cited by counsel for the plaintiff in error, to effect that property or money held by an executor or administrator of an estate in a representative capacity can not be reached by attachment or garnishee process in an action against the heirs or legatees before an order of distribution has been made, have no application.

By virtue of the will of Almeda Rice, the plaintiff in error had a life estate in the lands attached, subject to the provision for the creation of a fund out of the income of the property for the erection of a monument, costing not less than \$500. This life estate is subject to attachment, and service by publication upon the defendant below, following the attachment of the real estate, was authorized by law and regularly made. The court of common pleas committed no error in overruling the defendant's motion to quash service.

Judgment affirmed.

CONSTRUCTION OF LEASE FOR GAS AND OIL LANDS.

Court of Appeals for Licking County.

THE COLUMBUS NATURAL GAS COMPANY v. J. W. DUNLAP,
AMANDA BLINE AND JACOB F. BLINE.

Decided, 1914.

Oil and Gas—Construction of Lease Providing Rental for Completed Wells and for the Land Prior to Such Completion—Words “Completed Well” Mean a Productive Well.

In a lease of land for exploration for gas and oil, wherein it is stipulated that the lessee shall pay \$200 each year in advance for the product of each well from the time of its completion, and in case no well is completed within a specified time the lessee shall pay a rental of \$580 for each year such completion is delayed thereafter, and each completed well shall only reduce the land rental \$200, the words “completed well” have reference to a productive well and not to a dry hole, and the lessee is not entitled to a reduction of \$200 in his rental because of the completion of an unproductive well.

Fitzgibbon, Montgomery & Black, for plaintiff in error.
J. M. Swartz, contra.

POWELL, J.; VOORHEES, J., and SHIELDS, J., concur.

On the 20th day of September, 1907, the plaintiff in error and the defendants in error entered into a contract in writing whereby the said defendants in error leased to plaintiff in error 256 acres of land in this county, and which is described in the petition, for the purpose of exploring the same for oil, gas or water, and for producing and marketing the same, if any oil or gas were found thereon.

The conditions of said lease so far as they relate to the present controversy, are as follows:

1. The lease was for the period of five (5) years “and as much longer as oil or gas is found in paying quantities.”

2. “If gas only is found, second party (plaintiff in error) agree to pay \$200 each year in advance for the product of each well, from the time of the completion of same.”

1914.]

Licking County.

3. "In case no well is completed on or before February 13, 1908, second party shall pay to the first party (defendants in error) five hundred and eighty dollars for each year thereafter such completion is delayed, payable annually in advance."

4. "It is further provided that each well completed shall only reduce the land rental two hundred dollars."

Plaintiff in error completed two wells, that produced gas, and by payment of well rentals of \$200 each, it reduced the land rentals to \$180. It then completed a third well which did not produce gas or oil, so that no well rentals were due from it, and then refused to pay the \$180 land rental due February 13, 1913, all other rentals having been paid to that date. The defendants in error brought suit to recover said sum. The question is raised by demurrer to the answer which sets out the various payments of rentals, and the refusal to pay the \$180 land rental after the completion of the third well without finding gas or oil, and while continuing to occupy said lands under said lease.

There are two kinds of rentals provided for in the contract—\$580 land rentals, and well rentals of \$200 per year in advance for the product of each well, when gas only was found. Each well completed should only reduce the land rental \$200. The completion of two wells reduced the land rentals to \$180, and the completion of the third well is claimed to have reduced the land rental to nothing, although such third well is not productive of either gas or oil. But there being no *product* from such well, plaintiff in error claims it was not obliged to pay any well rental therefor.

What is the true construction of the contract, and what is the reasonable construction of the same?

In the opinion of the court this is not what was intended by the parties when the contract was executed. We think that the parties had in contemplation two kinds of rental or source of income, one of which should never be less, while the lease was in force, than \$580, while the other might go to any limit that the supply of gas would warrant. In the intendment of the parties, as it appears to the court, a "completed well" does not mean a

dry hole in the ground, but a productive well as a source of income to the plaintiffs below. The expression "if gas only is found" contemplates that something of value must be found, otherwise it would be as reasonable for defendants in error to claim that plaintiff in error should pay \$200 for the product of each completed well, even though that product was nothing but water. Neither position is tenable.

There was no error in the action of the court of common pleas, in sustaining said demurrer, and its judgment will be affirmed, and the cause will be remanded for execution.

**LIABILITY OF HUSBAND FOR FUNERAL EXPENSES OF WIFE
WITH WHOM HE WAS NOT LIVING.**

Court of Appeals for Delaware County.

GEORGE H. HUMPHREY & SON V. ALANZO HUFF.

Decided, April Term, 1914.

*Husband and Wife—Wife's Funeral Expenses May be Made a Charge
Against Husband—Notwithstanding They Were Living Apart
Under an Agreement of Separation.*

1. A husband is not relieved from liability for the expense of the funeral and burial of his wife by the fact that they had entered into a written contract to live separate and apart during the remainder of their natural lives, notwithstanding for considerations satisfactory to herself the wife had stipulated in said contract that she thereby released the said husband from all claims she had on him by reason of their marriage relation.
2. In such a case presentation of the claim to the administrator of the estate of the wife is not a condition precedent to the bringing of suit against the husband.

Overturf, Hough & Jones, for plaintiff in error.
Marriott, Freshwater & Wickham, contra.

SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.

The action below was brought by the plaintiffs in error, plaintiffs below, to recover from the defendant in error, defendant

1914.]

Delaware County.

below, upon an account for the funeral expenses and costs of burial of the wife of the defendant.

By answer the defendant set up as a defense that he and his wife, Alice Huff, during her lifetime entered into a written contract "to live separate and apart from each other during the remainder of their natural lives, and for the sum of \$200 paid by the defendant to his said wife, and for other satisfactory and valuable considerations it was stipulated in said contract that said wife released the defendant from all and singular the claims she had on the defendant that may arise by reason of their marriage relations and that they should always live thereafter the same as if no marriage between them had ever taken place, and that the defendant was forever released from all claims his said wife may have against him for her support and maintenance."

He further alleged that the terms of said contract were fair, reasonable and just to his said wife under the circumstances of the parties at the time it was made. That all the stipulations contained in said contract were fully complied with by the defendant and that by reason thereof he claims he is released from all claims which his marriage relation imposed on him.

To this answer the plaintiffs filed a general demurrer which was by said court overruled, to which the plaintiffs excepted, and not desiring to further plead, judgment for costs was thereupon entered in favor of the defendant, to all of which the plaintiffs excepted, and thereupon a petition in error was filed in this court for the review and reversal of said judgment.

That the plaintiffs in error rendered the services sued for is not disputed, nor is the reasonableness of the charge made for the same disputed, but the defendant in error denies his liability therefor not because of his relation as husband, but because of the contract of separation set up in his said answer.

It is apparent that in such contract the defendant in error sought to relieve himself of the obligation for the support of his wife, and while the terms of such contract may have been "fair, reasonable and just," do they extend to and cover the burial expenses of his wife? Counsel for the defendant in er-

ror argued that the action of the court below in overruling said demurrer was proper, first, because it does not appear that said claim was presented to, allowed or rejected by the administrator of the estate of the deceased wife, and second, that said deceased wife's estate is liable for said burial expenses and that the defendant in error is not liable therefor.

First, the husband is primarily liable for his wife's debts, and even though the separate estate of defendant in error's wife, if she had any, may have been liable for her debts, still one furnishing services and expenses for the wife's burial has the election to proceed either against the surviving husband or the deceased wife's estate to recover for such services and expenses. Here the pleadings fail to show whether or not the wife of defendant in error left a separate estate, but whether she did or not is immaterial, as we view the case, for plaintiff in error having elected to sue the surviving husband on said account rendered the appointment of an administrator of the estate of the deceased wife unnecessary, and therefore presentation of said account to the administrator of her estate, if one was appointed, was not a condition precedent to bringing suit on the same.

Secondly, did said contract of separation relieve the defendant in error from the payment of the account sued on? Under the common law it was clearly the duty of a husband to pay the burial expenses of his wife, and while the rights and powers of the wife have been materially changed and greatly enlarged by legislation in this state so that she may contract for, acquire and hold property in her own name and her separate estate may become bound for any obligation incurred for her benefit upon the faith of such separate estate, we know of no rule laid down in any adjudicated case in this state that modifies the above rule of common law liability or absolving the husband from the payment of his wife's funeral debts. True it has been held in other jurisdictions that where the deceased wife left a separate estate and her estate was proceeded against, a recovery has been had against such estate.

Section 7997 of the General Code provides that:

1914.]

Delaware County.

“The husband must support himself, his wife and his minor children out of his property or by his labor. If he is unable to do so the wife must assist him so far as she is able.”

As was said in *Phillips v. Tollerton, Exr.*, 9 N.P.(N.S.), 565-568, 569, “this statute recognizes and is declaratory of the common law (*Toledo v. Duffy*, 13 C. C., 482; *Chittenden v. Chittenden*, 22 C. C., 498). The enactment of this statute seems to be a distinct recognition of common law duties and liabilities.” The support of the wife by the husband, under the terms of the foregoing statute, is made obligatory without reference to any separate estate of the wife. If this is so, what is there to exempt the husband from liability on the claim here sued on? The contract of separation? The contract referred to was undoubtedly a valid contract as between the defendant in error and the deceased wife of the defendant in error; but whether as such it extended to any and all claims that might arise or may have arisen in favor of third persons is not so clear, but this question is not before us at this time. After having investigated the Ohio authorities cited (*Phillips v. Tollerton, Exr.*, 9 N.P.(N.S.), 565; *Eveland and Motzinger v. Sherman et al*, 9 N.P.(N.S.), 559; *Ritcher v. Ritcher*, 11 Ohio Dec., 377), based as they seem to be upon sound reason and principle, we are of the opinion that the court below erred in overruling said demurrer, and said judgment of the said court of common pleas will therefore be reversed, and said cause remanded to said court with instructions to sustain said demurrer and for such other and further proceedings as are authorized by law. Exceptions may be noted.

NEGLIGENCE OF CHAUFFEUR AND LIABILITY OF HIS EMPLOYER.

Circuit Court of Cuyahoga County.

L. Q. RAWSON, ADMINISTRATOR, v. THE OLDS MOTOR WORKS.*

Decided, May 27, 1912.

Employer and Employee—Negligence of Employee in Use of Employer's Automobile—Employer Not Liable, When.

When an employee of the owner of an automobile steps aside from his employment and uses his employer's automobile for his own purposes alone, during which use he negligently injures another, the employer is not liable for such injuries.

Seaton & Paine, for plaintiff in error.

V. H. Burke, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The action in the court below was brought by the plaintiff, who is plaintiff in error here, as administrator of the estate of Jerry Mahoney, deceased, to recover damages of the defendant for the death of the said Jerry Mahoney, claimed to have been caused by the negligence of the defendant, acting through one of its servants.

At the close of the plaintiff's evidence the trial court, on motion of the defendant, directed a verdict for said defendant. Proper steps were taken by the plaintiff to save the question for review, and by this proceeding in error we are called upon to determine whether the court erred in so directing a verdict for the defendant.

The facts are substantially as follows:

The defendant, the Olds Motor Works, is a Michigan corporation and maintains a branch office in the city of Cleveland, for the sale and distribution of automobiles manufactured by it, and for the repair and maintenance of such automobiles.

*Affirming *Rawson v. Olds Motor Works*, 12 N.P.(N.S.), 145; judgment of Circuit Court affirmed by Supreme Court without opinion, June 29, 1914.

1914.]

Cuyahoga County.

On the 28th day of September, 1908, William Booth was in charge of the Cleveland branch of the defendant's business as sales manager, and William Clark was employed there as a washer, and when not engaged in the work of washing cars, did general work about the branch office, and operated and delivered cars.

On the day mentioned Mr. Booth, having received a telegram from a main office of the defendant in Detroit, calling for the shipment to that city of a certain car then in the Cleveland Branch, by way of the Detroit boat, ordered and directed William Clark to take this car to the dock of the Detroit boat and ship it to Detroit. This order was given about the close of the business day. The branch was located on Euclid avenue near East 22nd street; the dock is at the foot of Superior avenue, west of the place of business of the defendant. The boat left at 10:15 o'clock in the evening, and in order that the car might be shipped it was necessary that it be at the dock by about 10 o'clock.

The usual route over which cars were taken from the defendant's branch was from the garage on Euclid avenue through an alley westerly to East 18th street, northerly on East 18th street to Euclid avenue, westerly on Euclid avenue to East 9th street, to Superior avenue, to the Detroit boat dock at the foot of Superior avenue.

On the day mentioned, Clark, about 6:30 P. M., took the car which he had been directed to deliver at the boat and drove to a restaurant on Prospect avenue, where he obtained something to eat. After he had finished eating, he invited two waitresses at the restaurant to accompany him on a ride, and the invitation being accepted, they all got into the car and after driving about in various directions, drove onto St. Clair avenue from East 9th street and started east, in a direction exactly opposite to that necessary to arrive at the dock of the Detroit boat, for the purpose of taking a trip to Euclid Beach. While driving east on St. Clair avenue in the vicinity of East 14th street, at about 8 o'clock P. M., Clark struck Jerry Mahoney, a boy 15 years of age and ran over him and killed him with the automobile, under circumstances tending to show negligence on Clark's part in the

operation of the car. Later in the evening Clark took the car to the boat dock for shipment to Detroit.

The law of master and servant which we conceive to be applicable to this state of facts, is considered at length in *The Lima Railway Co. v. Little*, 67 O. S., 91. In paragraphs 2 and 3 of the syllabus the law is stated as follows:

“2. The test of a master’s liability is not whether a given act was done during the existence of the servant’s employment, but whether such act was done by the servant while engaged in the service of, and while acting for the master, in the prosecution of the master’s business.

“3. A master is not liable for the negligent act of a servant or employee, if at the time of the doing of such act the servant or his employee is not then engaged in the service or duties of his employment although the act be one which if done by such servant or employee in his master’s service would be clearly within the course and scope of the usual and ordinary duties of such servant or employee.”

In the opinion on page 88, it is said:

“In determining whether a particular act was done in the course or within the scope of the agent’s employment, two things are always primarily considered.

“First. Was the agent engaged at the time in serving his principal?

“Second. Even though he was so engaged, was the act complained of within the scope of the agent’s employment?

“The cases dealing with the subject have generally to do with one or the other of these questions, and can generally be classified under these two heads.”

Applying the principles announced in that case to the facts before us in the cases under consideration, was Clark, at the time of the accident to Jerry Mahoney, engaged in the service of the Olds Motor Works, and was he in the prosecution of its business?

It is conceded that he was in the employ of the defendant, and that the fatal injury to the boy could not have occurred except for the facilities afforded Clark for committing the act complained of, by entrusting him with the automobile.

The only act required of Clark, however, was to take the car to the Detroit boat. Whatever may have been his intention when

he started, he turned aside from the performance of the duty imposed upon him, and departed entirely from the scope of his employment with respect to that particular car. For all practical purposes he appropriated the car to his own use and devoted it to his own purposes, exclusively. In starting on a ride to Euclid Beach for his own pleasure, he was engaged in his own exclusive enterprise. By thus stepping aside from his master's business, to serve his own purposes, the relation of master and servant existing between the Olds Motor Works and himself was suspended, and no liability for his acts committed during the period when he turned aside from his master's business attached to the latter, unless, as is contended on behalf of the plaintiff in error, the automobile is a dangerous instrumentality, and the master liable for the negligent act of his servant, to whom he has committed the custody and control of such instrumentality, whether the servant is at the time of the injury complained of, in the master's business or otherwise.

It has been held that the duty of those who use dangerous agencies in the prosecution of their business, to observe the greatest care in the custody and use of them, can not be shifted by a master from himself to his servant, so as to exonerate him from the negligence of the servant in the use and custody of them, and that where they are entrusted, the proper custody as well as the use of them, becomes a part of the servant's employment by the master, and his negligence in either regard is imputable to the master, in an action by one injured thereby, and when the injury results from the negligence of the servant in the custody of the instrument, it is immaterial so far as the liability of the master is concerned, as to what use may have been made of it by the servant. *Railway v. Shields*, 47 O. S., 387.

The plaintiff in error invokes this principle and insists that the defendant in error having made its servant the custodian of a dangerous instrumentality, is liable for the negligence of its servant in the custody of such instrumentality, regardless of the use of it by him.

This contention would be sound if an automobile is to be classed as a dangerous instrumentality, but it can not be so classed. It is not inherently dangerous. In the hands of a care-

less or reckless operator in the public streets, it may become a dangerous instrument, but the danger arises from its use and operation, and not from any inherent quality of the automobile.

In *Cunningham v. Castle*, 127 N. Y. App. Div., 530, it was held:

"The owner of a motor car is not, as a matter of law, liable for injuries caused by the negligence of his chauffeur when not engaged in the master's business, but using the car with the master's knowledge and consent on a private pleasure trip of his own."

The court in answering the same argument advanced here said:

"It is urged that the automobile was a dangerous instrumentality, and having been entrusted to the chauffeur, the liability of the master still attaches because of its dangerous character. The automobile is not necessarily a dangerous device. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. There is no evidence that the chauffeur was not competent and qualified to run the machine. In fact, he was employed by the defendant for that very purpose.

"If a game keeper had borrowed his master's gun and had gone from the estate on a hunting expedition of his own, and had negligently shot a man, would the master be responsible because he was using that instrumentality which might be dangerous if carelessly used, the gun?"

We are of opinion that the trial court did not err in directing a verdict for the defendant at the close of the plaintiff's evidence, and this being the only error complained of, the judgment of the court of common pleas is affirmed.

1914.]

Hamilton County.

THE EQUITABLE REMEDY OF A RECEIVERSHIP.

Court of Appeals for Hamilton County.

**THE GEORGE WIEDEMANN BREWING COMPANY V. OTTO
HERMAN ET AL.**

Decided, May 24, 1913.

*Receiver—Effect of Appointment—Will be Denied upon Petition of a
Creditor, When—Section 11894.*

There is no authority for the appointment of a receiver for the property of a debtor, where the plaintiff is the owner of a simple contract claim, and an appointment would exclude a judgment creditor from his right to levy upon the said property for the satisfaction of his judgment.

*Dolle, Taylor & O'Donnell, for plaintiff in error.**James M. Stone and August Bruck, contra.*

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

The only question involved in this case is the jurisdiction of the insolvency court in an action to appoint a receiver to take charge of all the property of a corporation on the petition of a creditor whose claim is on an account for merchandise sold, and has not been reduced to judgment, where the sole object of the receivership is to conserve the property of the defendant and prevent the levy of an execution or executions thereon and sale thereunder.

The corporation known as "the Spotlesstown Club," whose property is thus protected, is a corporation not for profit and is operated for the "physical and social benefit" of its members. The property consists of a club house with its furniture and fixtures on the Little Miami river near Milford Park, and its only other assets are the uncollected accounts owing to it by its members.

It appears that the next day after the George Wiedemann Brewing Company had received a judgment in the court of common pleas for more than \$1,400 against the Spotlesstown Club,

plaintiff below, who claims less than \$45, filed his petition in the insolvency court praying for a receiver, in which he sets out the fact that the brewing company had obtained its judgment and threatened to levy execution thereunder, and that other creditors were also threatening suits, and that a sale by the sheriff upon execution would be at a sacrifice. The defendant club appeared contemporaneously with the filing of the petition and filed its answer consenting to the appointment of a receiver as prayed for, and the appointment was made. The brewing company had no notice and was not a party to the suit as originally filed. On its own application within three days after the filing of the petition the brewing company was made a party defendant and filed an application to vacate and set aside the appointment of the receiver. This application was denied and the brewing company brought these proceedings in error to reverse the action of the court thereon.

The action in the insolvency court was exclusively one for the appointment of a receiver. No other relief was sought that the court had jurisdiction to grant. The sole purpose of the proceeding as shown by the petition itself was to prevent creditors from pursuing the remedies allowed them by law for the recovery and enforcement of their judgments. The only relief the plaintiff's claim primarily entitled him to was a money judgment for the amount of his claim, and the insolvency court has no jurisdiction to enter such judgment in favor of plaintiffs.

It is contended that Clause 1 of the General Code, 11894, authorizes the appointment of a receiver in an action "by a creditor to subject property or a fund to his claim." But this is only in a proper cause pending in such court. It does not authorize the court on behalf of the owner of a simple contract claim through the medium of a receiver to take possession of the property of a debtor to the exclusion of the right of a judgment creditor to levy an execution thereon for the collection of his judgment.

As was said by the court in *C., H. & D. R. R. v. Duckworth*, 2 C. C., 518 (affirmed by the Supreme Court, 21 Bul., 36):

"The appointment of a receiver is merely a provisional remedy ancillary and auxiliary to the main action, and can only be

1914.]

Hamilton County.

made in an action brought to obtain some other equitable relief which the court had the right to grant and where it appears to be necessary to make such appointment in order to preserve the property during the litigation, so that the relief awarded by the final judgment, if any, may be effective."

The appointment of a receiver can not be the ultimate relief sought. It is exercised by the court in a proper action to preserve the property upon which its subsequent judgment may operate. It is in the nature of an attachment or execution before judgment. *Callahan v. Ice Co.*, 13 C. C., 479.

As said by Judge Spear in *Cheney v. Maumee Cycle Co.*, 64 O. S., at 214:

"His appointment is an equitable remedy bearing the same relation to courts of equity that proceedings in attachment bear to courts of law, the appointment being treated as an equitable execution. The purpose is to secure the means for satisfying the final order and judgment of the court in the action, and the effect of the seizure is to place the property seized in the custody of the court," and citing *R. R. Co. v. Sloan*, 31 O. S., 1.

And the rule is thus stated in 34 Cyc., 29:

"It is well settled as a general rule that the appointment of receivers is an ancillary remedy in aid of the primary object of a litigation between the parties, and such relief must be germane to the principal suit; and a suit can not be maintained under this general rule where the appointment of a receiver is the sole primary object of the suit and no cause of action or ground for equitable relief otherwise is stated."

The appointment of receivers for failing corporations made upon their own applications or that of some obliging creditor has been justly reprobated in numerous cases. *Bank v. Lakeside Co.*, 19 C. C., 365; *Delacroix v. L. Eid Concrete Steel Co.*, 7 N.P. (N.S.), 489; *Gott v. Schultze Co.*, 12 N.P. (N.S.), 206; *Fairmount B. A. v. Rehn, Jr.*, 6 N. P., 185.

The vigilance of a creditor is poorly rewarded if as soon as he has obtained his judgment he is prevented from collecting it by execution because some friendly creditor fearing that the debtor's property may not yield the full value at judicial sale succeeds in inducing a court of equity to prevent such sale by a

receivership. The case at bar is certainly unusual because it can hardly be expected that the receiver could make a profit out of the operation of a social club, or that it would yield more if sold as a going concern.

Nor will the fact that the order authorized the receiver to collect club dues in arrears in addition to conserving the club house and furnishings give to the court the power of appointments which we have found to be otherwise lacking.

The court below had no power to appoint a receiver and its order should be set aside and vacated. Cause remanded.

PROCEDURE WHERE CHARGES OF WRONGDOING ARE MADE AGAINST AN OFFICER ELECT.

Court of Appeals for Jefferson County.

THE STATE OF OHIO, ON RELATION OF JOHN G. BELKNAP, V. THE
BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS
AND CHARLES H. GRAVES, SECRETARY OF STATE.

Decided, May Term, 1914.

Office and Officer—Construction of the Corrupt Practice Act—Board of Deputy State Supervisors of Elections Can Not Assume Judicial Prerogatives—Not Authorized to Refuse a Certificate of Election. When—Mandamus Against Board to Compel Issuance of Certificate—Secretary of State May Be Joined in such an Action, When—Sections 5175-2-3.

1. When the person elected to the office of probate judge has filed itemized statements purporting to contain a full statement of all the money or other things of value promised, received or expended, and the liabilities incurred in connection with such election, and the primary election therefor, in substantial compliance with Sections 2 and 3 of the act known as the corrupt practice act (Section 5175-2 and 3, General Code) the board of deputy state supervisors of elections are not authorized under Section 8 of this act to refuse a certificate of election to such person on the grounds that the board believes the statements filed are false and incomplete.
2. In mandamus proceedings by the person elected to the office of probate judge begun in the county in which the election was held

1914.]

Jefferson County.

against the board of deputy state supervisors of elections to compel the issuing of a certificate of election to him, the Secretary of State may be joined with said board as a party defendant, where the Secretary of State under color of his office has assumed the right to direct said board to refuse the certificate, and where the certificate has been refused by reason of such direction.

3. In the trial of such mandamus proceedings the defendants can not introduce evidence tending to prove that such statements are either false or incomplete.

A. C. Lewis and J. O. Naylor, for plaintiff.

Timothy S. Hogan, Attorney-General, *James I. Boulger* and *M. N. Duvall*, contra.

POLLOCK, J.; METCALFE, J., and NORRIS, J., concur.

This is an action in mandamus and comes into this court on appeal. The relator, John G. Belknap, says that at the general election for state and county officers, held on the 5th day of November, 1912, he was elected to the office of probate judge of Jefferson county, Ohio, having received a plurality of the votes cast for candidates for that office at this election; that the defendant, the board of deputy state supervisors of elections, afterwards refused to issue to him a certificate of election; that this refusal was by the direction and request of the defendant, the Secretary of State of the state of Ohio. He asks that a writ of mandamus be ordered issued requiring said board to issue a certificate to him of his election, and requiring the Secretary of State to issue to him his commission.

An issue was joined by separate answers of the board and of the Secretary of State, denying that the accounts filed by the relator of his expenditures at the primaries and election complied with the statute, and that they contained all the expenditures made by relator at either the primaries or election.

The case was heard upon a transcript of the evidence and evidence offered by the defendants in the court of common pleas, which was agreed to be received as the evidence, and evidence offered in the trial in this court.

The evidence in this case proved that at the general election held on the 5th day of November, 1912, the relator, John G.

Belknap, received the highest number of votes of any candidate for the office of probate judge of Jefferson county, Ohio; that the returns were duly opened by the board of deputy state supervisors of elections, and an abstract of the votes cast made by this board and signed by the board and clerk, and a duplicate copy thereof forwarded to the Secretary of State; that afterwards the relator tendered to this board five dollars, the fee required by statute, and demanded that this fee, together with a certificate of his election, be forwarded to the Secretary of State at Columbus. This was refused by that board.

It is further proven that after the election the Secretary of State directed this board that they should refuse to issue a certificate of election to relator, and it was in obedience to his direction that the board of deputy state supervisors refused the certificate to relator.

The testimony further shows that on the 21st day of May, 1912, the relator filed with the board of deputy state supervisors of elections, properly qualified, what purported to be an itemized statement of his receipts and expenditures as a candidate for the nomination to this office at the primary election held in that year, and that on November 6th, 1912, he filed a like statement, properly qualified, of his receipts and expenditures as a candidate for election to the office of probate judge. The relator then rested his case.

The defendants then called as a witness Daniel Coll, who was asked whether he received anything of value from any candidate for office at either the primary or the general election in the year 1912.

Plaintiff objected, and the objection being sustained, was excepted to by the defendants. The defendants then stated that they expected to prove by this witness that at the May primary, 1912, the relator promised to give the witness a shotgun and case if he would agree to use his influence for relator at that primary, and afterwards, and before the election in November, did give him a shotgun and case for his influence at the primary election and at the general election.

1914.]

Jefferson County.

The defendants also called a number of other witnesses, stating that they expected these witnesses to testify to the receipt of different sums of money from the relator for their influence in his favor as a candidate for this office, and which were not accounted for in his itemized statement. This testimony was objected to by the plaintiff, the objection sustained and exception noted. Defendants then rested.

The only issue to be determined in this action is the right of respondents to refuse to issue a certificate of election to relator for the reason that they claim the accounts of his expenditures which he filed were not complete, as required by what is commonly known as the "Kimble Corrupt Practice Act" (Section 5175-1 and following of General Code), and that the account which he did file of his expenditures was not true, and that he violated the provisions of that act in his expenditures.

This brings us to a consideration of the question, under what circumstances does the board of deputy state supervisors of elections, either on their own motion or by the direction of the Secretary of State, have a right to refuse to issue to the successful candidate at an election a certificate of his election?

Sections 2 and 3 of this act provide that every candidate who is voted for at any election or primary election, shall within ten days after such election file an itemized statement showing in detail all the moneys or things of value contributed, promised, received and expended, and all liabilities directly or indirectly incurred in connection with such election, and that this statement shall contain the full name and address of the candidate, the specific nature of such item, the purpose for which, the place where, and the date when it was contributed, promised, received, expended or incurred.

Section 7 provides that the Secretary of State shall prepare a form of the statement required by this act, and shall furnish the same to the board of deputy state supervisors of elections for each county, and, upon application, to any candidate.

Section 8 provides that no board or officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any person required

by this act to file a statement or statements until such statement or statements have been so made, verified and filed by such person, as provided by this act. No person required by this act to file a statement or statements shall enter upon the duties of any office to which he may have been elected until he has filed all statements provided for by this act, nor shall he receive any salary or emoluments prior to the filing of the same.

Section 13 provides that any person who violates any of the provisions of this act shall be held guilty of a corrupt practice, and shall be punished as hereinafter provided.

Section 14 then provides that where any person required to file such a statement has failed to do so, or has filed a false or incomplete statement or account, that upon petition being filed with the court of common pleas, or a judge thereof, the probate court, court of insolvency or superior court, the question of the failure to file an account, or its falsity or incompleteness, shall be investigated.

This petition can be filed by the Attorney-General of the state, or by the prosecuting attorney of the county, or by five residents and qualified voters who voted at such an election. If filed by the qualified voters they shall give bond to secure the costs, but this bond is not required of either the Attorney-General or the prosecuting attorney. Notice shall then be given to the person named in the petition to appear and show cause within ten days. This investigation shall take precedence over all other business in the court, and provides for a speedy hearing and determination of the question.

Section 21 of this act provides that if the person required to file this statement has failed to file such statement or account, or has filed a false or incomplete statement or account, the court or judge hearing the petition shall require him to file a correct one within ten days, and if such failure to file the account, or the filing of a false and incomplete account, was a wilful intent to defeat the provisions of this act, the court or judge shall forthwith transmit a copy of his decision and of the evidence to the prosecuting attorney of the county, with directions to such prosecuting attorney to present the same to the next grand jury of the county.

1914.]

Jefferson County.

Section 32 provides that any person convicted of a corrupt practice under this act shall be fined or imprisoned in the county jail, or both, and if he shall have been elected to office, shall in addition thereto, forfeit such office. The petition mentioned in Section 14 shall be filed within forty days after the election, if the statement was filed within the ten days required.

Section 34 provides that all of the prosecutions under this act shall be commenced within one year after the commission of the act complained of.

Respondents claim that under Section 8 they are authorized to withhold a certificate of election from the relator for the reason that while he filed the accounts required by this act, yet they were not complete and they did not contain all of the expenditures made by the relator, and that he violated the provisions of this act in making expenditures.

The accounts as filed were on the forms prepared by the Secretary of State. The statements contained the full name and address of the relator, and are properly qualified to by him. An examination of the accounts will show that some of the expenditures are not properly itemized, and the purpose for which, and the persons to whom they were made, are not fully stated.

The question then arises whether the board of deputy state supervisors of elections are authorized to pass upon the statements where they are on their face regular and substantially complete, and refuse a certificate of election on the ground that in their judgment they do not fully comply with the statute, or on the ground that the successful candidate made other expenditures not included in his statements in violation of this act.

It will be noticed that a board or officer can only refuse to issue a certificate of election or commission until such statement or statements have been made, verified and filed by such person, as provided by this act. There is nothing in this act which authorizes a board or officer whose duty it is to issue a certificate or commission of election, to refuse because the statement filed is not a complete statement, or that it does not include

all expenditures made by the candidate. All that such board or officer has to do is to determine whether such a statement has been filed or not. The duty of determining whether such a statement is either incomplete or false devolves upon the court before whom a petition is filed, charging that a candidate has not complied with the provisions of this act in either of these regards.

It was held in *State v. Tanzey*, 49 Ohio St., 656, that:

“The duties of the board of deputy supervisors of elections, in making the abstracts of the votes returned by the officers of the election precincts of the county, are purely ministerial, and are limited to compiling the votes shown by the tally sheets so returned, and setting down to each candidate the aggregate number of votes so appearing to have been cast for him, and to certifying and transmitting the abstract so made, to the proper officer.”

The only change in the duties of the board in regard to returns of election, and returns of election made by Section 8 of this act, is that it shall not issue a certificate of election until the statements required by the act have been made, verified and filed. If the statements have been filed, the duties of a board or officer end, and the certificate should issue. The board can not assume the judicial prerogative of determining that the person receiving the plurality of the votes cast at the election has violated the corrupt practice act, and for that reason refuse to discharge their plain statutory duty.

The act leaves to the court or judge before whom charges have been made, the authority to determine whether the statements are either incomplete or false. The act then provides for a speedy hearing of the petition, and if the court finds that the statements were not filed, or if filed, not correct or complete, he shall then be required to file statements or corrected ones. If the court or judge finds that he wilfully failed to file a statement, or wilfully filed a false or incomplete statement, then the attention of the grand jury shall be called to the matter, and, if indicted and afterwards convicted before a jury, he shall in addition to the other punishment forfeit the office. This forfeiture does not depend upon the will of any board or

1914.]

Jefferson County.

officer, or the judgment of any court. It is only after he has been convicted by a jury of a criminal violation of this act that a person elected to an office shall forfeit the office.

If charges of wrongdoing are made against the successful candidate, this act provides an easy and speedy way for the determination of his right to receive the office to which he was elected, and only when a jury has convicted him of violating one or more of the provisions of this act, shall he be deprived of the office to which the voters have elected him.

“Where a statute creates a new offense by prohibiting and making unlawful anything which was lawful before, and providing a specific remedy against such new offense (not antecedently unlawful) by a particular sanction and method of procedure, that method of procedure and none other must be preserved.” *Commissioners v. Bank*, 32 Ohio St., 194.

The same principle has been announced by the Supreme Court in the following cases: *State, ex rel, v. Marlowe*, 15 Ohio St., 114; *Commissioners v. Ziegelhofer*, 38 Ohio St., 528; *State, ex rel, v. Dairy Co.*, 62 Ohio St., 124; *State, ex rel, v. Ganson*, 58 Ohio St., 313.

This statute prohibits and makes unlawful acts which were lawful before its enactment, and the act itself specifically points out a method of procedure and a remedy or punishment which we think is exclusive.

It is claimed that the question involved in this case has been determined against the relator in the case of the State of Ohio on the relation of William C. Brown, against these same defendants, which was an action for writ of mandamus filed in the Supreme Court. If the Supreme Court has determined this question it is our duty and we will willingly follow their decision.

The petition of the relator in that action made substantially the same allegations as the relator in this action does, and in addition thereto he alleges that he had been indicted by the grand jury of Jefferson county for the violation of this corrupt practice act, and that he had never been tried or convicted on said indictment, and that said indictment was still

pending in the Court of Common Pleas of Jefferson County, Ohio.

The respondents, by their answer, denied that the relator had within the time provided by law, or at any other time, filed the itemized statements required of him as a candidate at the primary election, or the itemized statement required of him as a candidate at the November election; they denied that the relator had done all and singular the things required of him by law to entitle him to the issuing of a certificate of election.

To this answer there was a general demurrer filed by the relator. This demurrer was overruled by the Supreme Court without any report, and this is the decision of the Supreme Court which it is claimed we should follow in determining the question before us.

It is a rule of procedure that for the purpose of a demurrer all of the allegations of a pleading, against which it is filed, which are well pleaded, are admitted to be true. This rule is too well known to attorneys to require any citations of authorities. The answer filed in the Brown case, as above stated, specifically denied that the relator had filed the statement required by this act, and specifically denied that the relator had done all and singular all the things required of him by law to entitle him to his certificate. The answer, after these denials, made some statements admitting that statements had been filed which were not correct or true; but in passing upon the demurrer the court would accept the denials as statements of facts submitted. These denials were good grounds for overruling the demurrer.

And, again a demurrer searches the record, and the court in determining this demurrer would look to the relator's petition as well as to the answer, and in his petition he admitted that he had been indicted by the grand jury of his county, and that the case was yet pending. This was an admission that the procedure provided for by this act had been put in motion, and was then pending undisposed of.

The writ of mandamus is only granted in the exercise of a sound judicial discretion, and the court might well refuse to

1914.]

Jefferson County.

sustain this demurrer while an indictment was pending against the relator, which, if upon trial he was convicted, would forfeit his right to the office.

In the case before us no action is pending against this relator provided by this act, and the time for bringing any such action has long since passed. For these reasons we think that the decision of the Supreme Court in the case referred to should not control us in the determination of this question.

That the choice of the electors as expressed by their ballots should not be tainted with fraud and corruption is of the utmost importance to the electors and to the state, and such laws as the one we are now considering, enacted for the purpose of enforcing the purity of the ballot, are wise and should be rigidly enforced; but it is of equal importance, both to the electors and to the person elected, that the person rightfully elected by the people should be permitted to perform the duties of the office when he has been legally elected.

The Legislature in enacting the provisions under consideration, wisely provided a speedy and efficient means of determining the right of a person elected to an office, who may be charged with improper conduct in securing his election. It will not do to brush aside the proceedings provided by this act for a forfeiture of the office as mere technicalities not controlling on the courts, and proceed as a court of equity to deprive the party elected by the electors of his office.

The defendant, Charles H. Graves, as Secretary of State, interposes a further defense that the cause of action alleged against him did not arise in Jefferson county, and that no cause of action in which he is properly joined is rightfully brought in said county. This was not urged before us, but we find it made in the pleadings and will refer to it briefly.

Section 11255 provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved herein.

The real question involved in this case is the determination of whether or not the relator is entitled to this office. The issuing of the certificate of election or commission is only the

legal document conferring upon him the right to enter upon the office to which he has been elected; the ultimate object is the office, and the Secretary of State is a necessary party in conferring upon him the right to take possession of that office. He should not be required by legal action to first compel the board of deputy state supervisors of elections to issue to him a certificate, and then further prosecute another action in order to secure his commission.

"In proceedings for a writ of mandamus to compel the levy of a tax by a town to pay a judgment all the officers whose action is necessary to the levy of such tax may be properly joined as defendants, although some of them may not have refused to act." *McKie v. Rose*, 140 Fed. Rep., 145.

And again, it was held in *Marion v. Coler*, 75 Federal Reporter, page 352:

"Where a plaintiff has shown himself entitled to a mandamus to compel the levy and collection of taxes by a county to pay a judgment against it, he is entitled to one which will set in motion all the necessary machinery, including the action of the assessor and collector, required to be taken after the levy of the tax by the county court, although no demand has been made upon such officers to perform the act so required."

The Secretary of State assumed, by virtue of the authority of his office, to control the action of the board of deputy state supervisors of elections, and the certificate was refused and is refused because of his directions and instructions to the board.

Section 11271 of the General Code provides:

"Actions for the following causes must be brought in the county where the cause of action or part thereof arose. * * *

"2. Against a public officer, for acts done by him in virtue or under color of his office, or for neglect of his official duty."

The Secretary of State assumed the right to control the actions of the board, and because of his action in this regard the relator would have a right to join him as defendant with the board, in order to complete the determination of this action.

For these reasons we think the defendants can not introduce evidence offered by them, and that the writ should issue. Exceptions will be noted.

**AS TO AGREEMENT THAT NOTE MAY BE DISCHARGED
OTHERWISE THAN BY PAYMENT.**

Circuit Court of Cuyahoga County.

F. E. WETTSTEIN v. THE BANKERS NATIONAL BANK.

Decided, May 27, 1912.

*Promissory Note—Verbal Agreement for Discharge Otherwise than by
Payment, Unenforceable, When—Usurious Interest.*

1. A verbal agreement made contemporaneously with the execution of a promissory note that it may be discharged in some other way than by the payment of money, while it remains executory, is no defense to an action on the note, but when fully executed it operates as payment, or accord and satisfaction.
2. It is error to enter judgment on a promissory note for ten per cent. interest, though the note was executed and delivered in another state, unless there is proper evidence before the court that such interest is allowable under the laws of such other state.

Lang, Cassidy & Copeland, for plaintiff in error.*L. J. Grossman and I. N. Loeser*, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

The parties to this action stand in the reverse order to that in which they stood in the court below. The terms "plaintiff" and "defendant" however, will be used in this opinion as applied to the parties in the original action.

The plaintiff is a corporation organized under the banking laws of the United States of America, and located in the city of Ardmore, Oklahoma. Suit was brought by this plaintiff upon a promissory note executed by the defendant to one C. W. Baumbach, or to his order, at Ardmore, Oklahoma, on the 1st day of August, 1907, by which the defendant undertook to pay to the order of C. W. Baumbach on the 15th day of October, 1907, the sum of \$5,000 with interest at the rate of 10 per cent. per annum from maturity until paid, which said note was indorsed by said Baumbach and delivered by him to the plaintiff.

The petition is in the short form, and there is annexed to it and made a part of it a copy of the note upon which the suit was

brought, together with endorsement thereon of C. W. Baumbach. The defendant filed an amended answer to the petition, in which he admitted the execution of the note, but says that he ought not to be required to pay because, he says, that at or prior to the date of the note here sued on, C. W. Baumbach executed and delivered to the defendant his note for \$5,000 due October 15, 1907, with interest at the rate of 6% per annum; that at or about the time of the execution of the note here sued upon, it was agreed between the defendant and said Baumbach that in case said note so made to defendant should not be paid at its maturity, then defendant should not be liable upon the said note, so made by him either to Baumbach or to any transferee or holder thereof, but would be from thenceforth discharged from his obligation thereon; and it was further agreed that in case defendant failed to pay the note here sued upon, that Baumbach should not be liable upon his note to defendant or to any transferee or holder thereof, but would be from thenceforth discharged from his liability thereon. Defendant further says that the said Baumbach did not pay the said note at its maturity, and that the same is still unpaid. Defendant further says that at the time plaintiff acquired said note drawn by defendant to the order of C. W. Baumbach, and prior thereto, plaintiff was fully apprised of the agreement between the defendant and C. W. Baumbach as above set forth, and that plaintiff took said note with full knowledge of all the conditions and limitations thereto attached by reason of the said agreement.

To this answer the plaintiff filed a reply, which consisted simply of a denial of the affirmative matter set up in the answer.

On this state of the pleadings, the court, on motion of the plaintiff, gave judgment in its favor for the entire amount called for by the note, including 10 per cent. interest from its maturity. It is to reverse this judgment that the present proceeding is prosecuted.

Of course, if the answer of the defendant makes a good defense, then there was error on the part of the court in granting the motion. We are of opinion that the answer did not make a good defense. We have examined the briefs of counsel both for the plaintiff and the defendant, and our decision is based upon a

1914.]

Cuyahoga County.

consideration of the points made by both, including the provision made in Section 8224 of the General Code, which provides: "A negotiable instrument is discharged by another act which will discharge a simple contract for the payment of money."

The authorities with which counsel for both parties in this case are familiar, and which are cited and quoted from in their briefs, fully establish the position taken by the plaintiff in error, "that a verbal agreement made contemporaneously with the execution of a promissory note that it may be discharged in some other way than by the payment of money, while it remains executory, is no defense to an action on the note, but when fully executed it operates as payment or accord and satisfaction."

This is the way in which the rule is stated in the case of *Pattick v. Petty*, 83 Ala., 420, and is borne out by a large number of authorities, the authorities all being to the effect that no such contemporaneous agreement, while it remains executory, will constitute a defense to the note; and we have, therefore, the question presented of whether the giving of the contemporaneous note by the payee of the note sued upon in this action, with the agreement that if that note is not paid, the note sued upon was not to be paid, and that from that time on nothing was done by either party toward the payment of either note, constitutes an executed contract by which the note in suit should be discharged.

Certainly the giving of this contemporaneous note did not discharge the maker of the note in suit from the payment of such note. But it is urged that the non-payment of the note not here in suit itself operates to make of that note an executed contract, that is to say, the contract evidenced by that note, it is said, is executed because nothing was ever done about it. This contention is not, as we view it, sound. To make an executed contract which should operate as a discharge of the note in suit, something affirmative was required to be done after the execution of the notes. No affirmative thing ever was done; the result is that there was no executed contract for the discharge of this note, and the answer constituted no defense to the note sued upon.

But even though there had been no answer, it is said the court erred in giving judgment for the full amount called for by the terms of the note, to-wit, interest at the rate of 10 per cent.

We think this contention is sound. It is settled law and known to every lawyer, that in the absence of evidence to the contrary, the presumption is that the law of the place where the contract is executed is the same as the law of the place where the enforcement is sought. In this case there is no evidence on the subject. If this contract had been made in Ohio, it would on its face show a contract for the payment of usurious interest, and as said by our Supreme Court in the case of *Goode v. Sutton*, 29 O. S., 587, "If the petition on its face shows that the action is brought upon an instrument for the payment of money, by which the maker has agreed to pay usurious interest at a stipulated rate, and the interest had been paid at the usurious rate stipulated, the court is required, in the absence of an answer, of its own motion to see that judgment is not rendered for more than the balance found to be due after deducting the excessive interest so paid and applying it as payment upon the principal, or, if the usurious interest has not been paid, then for the amount found due by computing interest at the legal rate."

Keeping in mind, then, that the presumption is that the law of Oklahoma on the subject of interest is the same as the law of Ohio, the note on its face shows an agreement to pay usurious interest, and treating this as it should be treated, with this presumption of the law, it is clear that the court erred in allowing interest at a higher rate than 6 per cent., and unless the excessive interest is remitted by the plaintiff, the judgment will be reversed for error. If, however, such remittitur is made, the judgment for the amount of the note computed at 6 per cent. will be affirmed.

1914.]

Cuyahoga County.

BREACH OF COVENANT NOT TO ENGAGE IN BUSINESS.

Circuit Court of Cuyahoga County.

JOHN A. ARNOLD V. WLADYSLAW BUKOWSKI ET AL.

Decided, June 3, 1912.

Covenant Not to Engage in Business—Damages Instead of Injunction Allowed, When.

In an action by the purchaser of a grocery store against the person from whom he bought it under a covenant that the latter would not engage in the grocery business within one mile of the store sold, to enjoin the violation of said covenant and for damages for its breach, if it appear that pending the suit the purchaser has given up his store and ceased business, and is financially unable to continue business, an injunction against the defendant will not be allowed, but damages for violation of the covenant will be allowed the plaintiff.

Henry Du Lawrence, for plaintiff in error.*Hidy, Klein & Harris*, contra.

MARVIN, J.; NIMAN, J., concurs; WINCH, J., not sitting.

There are painful features about this case. The testimony of the parties to the case is such that one is almost forced to the conclusion that somebody has committed perjury wilfully. We can by no possibility know certainly who has committed such perjury, but there can be no doubt that in answer to some of the questions put to Amelia Bukowski she answered what was not true. This is certainly true in reference to the purchase by her of the store in which she is now in business. The fact that she gave this testimony, which is not true, tends to shake our faith in all her testimony where it is to her interest to have the facts appear as she states them.

We do not regard it as necessary to here give the details of this litigation. If the written instrument which is in evidence and is signed by the defendants, Wladyslaw Bukowski and Amelia Bukowski, is the contract into which they entered with the plaintiff, then that contract has been violated by these two

defendants, and although we can't certainly know whether the written instrument which is in evidence is exactly as it was when it was signed by these parties, we think the evidence is such that we should say, and we do say, that we find that the contract read when signed as it reads now. True, there are some things about its appearance that give color to the claim made by the defendants that the restrictive clause in this instrument was written after the instrument was signed and delivered to the plaintiff, but on the whole we think the evidence is not sufficient to justify us in saying that the instrument is not now as it was when it was signed, and that being so, the Bukowskis' were under contract, for which they received a valuable consideration, not to enter into the grocery business within one mile of the business which they sold to the plaintiff on the 14th day of November, 1911, yet, on the 18th day of February, 1912, they bought out a grocery from John Woisvill in the immediate neighborhood of the grocery which they had sold to the plaintiff, and went right on with the grocery business which they had thus bought and there continued in that business to the present time, all in violation of their contract with the plaintiff.

At the time this suit was begun and at the time of its trial in the court of common pleas, the plaintiff was in business at the place which he bought from the Bukowskis; he is not now in business there. He says that if he shall be successful in this litigation, he expects to go on with the business there, or rather to again open up the business which he has been compelled to give up. We do not think he can ever open up this business successfully. We think, in short, that so far as carrying on a grocery business in the neighborhood where this business was carried on, he is down and out.

We think, further, that he has suffered damage at the hands of the Bukowskis by their violation of their contract with him, but not to the degree that he and his counsel think that he has suffered. In his earnestness for his client, counsel for the plaintiff has brought himself to think that the defendant Amelia Bukowski is Michiavellian in her designs and ability to plot for the success of her schemes, and that she had in mind from the beginning that she would secure what money the plaintiff had and

1914.]

Cuyahoga County.

then, not only destroy his business, but as counsel expresses it, ruin the plaintiff, and that she has succeeded in preventing him from doing any business, and that he would have done a profitable business but for her plotting and scheming.

In this we think counsel for the plaintiff somewhat overstates the results to the plaintiff from the acts of the defendants Bukowskis. The plaintiff was a stranger in the city of Cleveland when he bought this business; he had no knowledge of the grocery business, and it was a mistake for him to have gone into the business. It took almost all his money to pay the Bukowskis for the property and the good will of the business, in addition to the note for \$350 which he gave them as a part of the consideration, which note is still held and owned by them, no part of it having been paid.

With the small amount of money which he had left, even if he had been experienced in the grocery business and had been acquainted with the wholesale dealers, it is very doubtful whether he could have gone on with a profitable business. He thinks he made \$500 the first month he was in business. We think he has no such means of estimating the cost of the goods which he sold and the profits therefrom which would accrue on such goods, to know that he has made any such profits, and that he must be mistaken in putting the profits at that amount. He says that in his second month he lost some money. During his second month the defendants weren't in business in his neighborhood, so that it was not because of the violation of the contract on their part that he did business at a loss the second month. It was three weeks after the close of his second month in business before the Bukowskis went into business, and during all that time he was losing money. His credit became bad with the wholesale dealers, not because of any dishonesty on his part, for we see nothing in his conduct in this matter in any way to indicate any dishonesty, but from the fact that his credit was bad with the wholesale dealers, and it was bad because his business was bad; it became very hard for him to supply himself with such goods as his customers needed, and we think it very natural that, as is said by some of the witnesses, they ceased to do business at his store, because they were unable to obtain the goods they wanted.

It is said in answer to this that though the plaintiff was losing money for the seven weeks or more immediately preceding the entering into business by the defendants in violation of their contract, yet this was because the defendants, especially the defendant Amelia Bukowski, was inducing customers to leave the store of the plaintiff, and because she induced an employee of the plaintiff who had been her employee, and who gave his special attention to the meat business, to leave the plaintiff's employment. We think another reason, to-wit, the one given by the employee himself, that he failed to get his wages, was sufficient reason why he might naturally have left the employment of the plaintiff, and not only that but, though good morals and good faith should have prevented Mrs. Bukowski from seeking to divert trade from the plaintiff or seeking to induce any employee of his to leave his employment, yet there was nothing in the contract to prohibit her doing this other than the prohibition against her or her husband going into business themselves.

The fact that the defendants went into business in violation of their contract conduced to the failure of the plaintiff to successfully carry on his business, but we think it only hastened the time when he was sure to have to go out of business. Another store of a similar kind had been started in the immediate neighborhood shortly after he went into business, which tended, of course, to take away his trade. Our sympathies are with the plaintiff; his misfortunes in the grocery business are attributable in part to his want of experience, his want of acquaintance in the neighborhood, his want of capital, and in part to the violation on the part of the defendant Bukowskis of the contract which they made with him and for which they were paid.

It is impossible for us to fix exactly what part of the damages which he suffered resulted from the violation of the contract by the Bukowskis; we can only make an estimate. We know that many of the customers who had been customers of the Bukowskis when they kept the store which the plaintiff bought, and who were customers of the plaintiff when he first went into business, are now customers of the Bukowskis, but a considerable number of them had already quit buying from the plaintiff some weeks before the Bukowskis opened up in their new place of business,

1914.]

Cuyahoga County.

and we have reached the conclusion, first, that the plaintiff is not now entitled to an injunction against the defendants, though as the facts were when this suit was begun, he was entitled to such injunction, and if we felt that the failure of the plaintiff to be able to go on in business was chiefly due to the violation on the part of the Bukowskis, perhaps the injunction should be allowed even as the facts now are, although by the direct terms of the restriction he would not be entitled to it, because the restriction was to only cover the buyer while he was in business at the place which he bought from them. But as already said, we think he can not carry on a business there successfully even though the defendants be enjoined, and so no injunction will be allowed, to prevent the defendants from continuing their business, but an order will be made directing that the note given by the plaintiff to the defendants be canceled and delivered to him and the defendants perpetually enjoined from asserting any claim under that note. In addition to this, we award to the plaintiff additional damages in the sum of \$500, and the costs of this action will be adjudged against the defendants Wladyslaw Bukowski and Amelia Bukowski. If it shall appear that the damages allowed are somewhat large as compared with the loss of profits which the plaintiff might probably have made, the answer is that the defendants have brought this upon themselves by their own wrongdoing, and are entitled to no sympathy whatever from the court.

JURISDICTION OVER NON-RESIDENT DEFENDANT.

Court of Appeals for Butler County.

GEORGE B. ORR v. ROBERT H. SHOEMAKER.

Decided, May, 1914.

Attachment—Motion to Discharge Not an Appearance Conferring Jurisdiction Over the Person of the Defendant, When—Subject-Matter of Action is Existence of the Indebtedness Charged and Not Ownership of the Property Attached.

1. Jurisdiction over the person of a non-resident defendant in a suit in attachment is not acquired by the filing of a motion by him for a discharge of the attachment for the reason that he is not the owner of the property upon which it has been levied.
2. The overruling of a motion for judgment by default is not a final order to which error can be prosecuted.

Harry T. Klein and Sam D. Fitton, for plaintiff in error.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

The point involved in this case is whether the defendant, by filing of the motion to discharge the attachment, inadvertently entered his appearance in the cause and thus gave the court jurisdiction of his person.

Defendant is a non-resident of Ohio. Two causes of action are embraced in the petition; one upon a promissory note and the other upon an account. A farm and certain chattel property upon it located in Butler county, were attached in said proceeding.

Defendant filed a motion in the following words:

“Now comes the defendant herein, by his counsel, and without entering his appearance herein and without waiving any of his rights, and for the purpose of this motion only, moves the court to discharge the attachment herein and to release the property claimed to have been attached in this proceeding, for the reason that said property is not subject to attachment herein as the defendant is not the owner of said property, and the court therefore has no jurisdiction of the subject matter.”

1914.]

Butler County.

On hearing, this motion was overruled by the court. Afterwards, in August, 1913, plaintiff filed a motion asking for judgment by default against the defendant, on the ground that the defendant had entered his appearance by filing the motion above quoted, and was in default for answer.

If this motion of defendant was for the purpose of contesting the merits of the cause in any particular, or the jurisdiction of the court upon the subject-matter of the action, it would constitute a waiver of all objections to the jurisdiction of the court over the person of the defendant, even though he had distinctly protested against such jurisdiction, as he did in this case. *Elliott v. Lawhead*, 43 O. S., 171; *Long v. Newhouse*, 57 O. S., 348, 370; 3 Cyc., 508.

It is clear, however, that the purpose of this action was to challenge the jurisdiction of the court to his person, by showing that the property sought to be attached was not his property and therefore the court had acquired no such jurisdiction over his person, and he had not been brought before the court. The subject-matter in the case was not the ownership of the property sought to be attached, but was simply whether he was indebted on the note and upon the account. The only question, therefore, brought before the court by the motion was whether the court had acquired a jurisdiction as against him. This is the construction that must be placed upon the motion, although it is not clearly drawn. The use of the words "subject-matter" in it does not refer to the subject-matter of the case itself, but rather to the property sought to be attached.

The motion filed in the case of *Newcomer v. Atkins*, 9 N.P. (N.S.), 308, contained several paragraphs addressed to the merits of the case, and yet the court properly held that the purpose of the motion was only to secure a discharge of the attachment and it did not effect an appearance.

The case of *Blinn v. Rickett*, 3 N.P.(N.S.), 345; 6 C.C.(N.S.), 513, is very similar to the case at bar; and the case of *Smith v. Hoover*, 39 O. S., 249, is exactly in point.

The court below was, therefore, correct in holding that jurisdiction over the person of the defendant had not been acquired, and in overruling the motion for a judgment by default.

The record fails to show that any evidence was offered or submitted to the court on the hearing of the motion for judgment. In our opinion, the overruling of this motion for judgment by default was not a final order of the court below, and the prosecution of error in this court to that ruling is therefore premature, and the petition in error should be dismissed.

CLAIM OF ABUTTING OWNER TO PART OF ROADWAY.

Court of Appeals for Hamilton County.

THE CITY OF CINCINNATI V. EMMA F. LEEDS.*

Decided, April 25, 1914.

*Dedication—Of a Roadway Where Not in Accordance With Statute—
Easement Enjoyed by a Turnpike Company is Vested in the Public
—Encroachments on Roadway.*

1. While there was no statutory dedication of what is now known as the Linwood road, the plat and deeds which are in evidence, taken in connection with the use of the strip as a public highway, have operated as a dedication to public use.
2. Such dedication was in nowise prevented by the fact that the way, to which the plat and deed refer and with reference to which they were drawn, was for a long period the property of and under the control of a turnpike company.

Walter M. Schoenle, City Solicitor, Frank K. Bowman, Assistant City Solicitor, Alfred Bettman and O. S. Bryant, for plaintiff in error.

C. Hammond Avery and Julius G. Penn, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

In 1815, John Morten became the owner of a tract of land of about sixty-five acres fronting on the south side of what is now known as Observatory avenue. About 1847, steps were taken before the county commissioners for the purposes of establishing the county road southeastwardly through this land from Observatory avenue to Wooster pike, under which viewers

*Motion to dismiss petition in error sustained by Supreme Court December 1, 1914.

1914.]

Hamilton County.

were appointed who reported a line of road and recommended that same be opened as a sixty foot road. The record shows an objection, or notice of appeal given on the part of a property owner, owning land near Wooster pike, not however affecting the part of the Morten property, and the record fails to show that this road was ever opened in accordance with said view.

In 1852 a turnpike or plank road was established through this land. Under a special act, found in Volume 49 Ohio Laws, 730, a company was organized under the name of the Union Bridge & Walnut Hills Turnpike Company,

“For the purpose of constructing and maintaining a turnpike or plank road commencing at the most suitable point in the Walnut Hills, Madisonville and Plainville turnpike east of Walnut Hills and running thence eastwardly to the Cincinnati, Columbus & Wooster turnpike, near the residence of John F. Ferris.”

And providing further that:

“The county of Hamilton shall have a right after twenty years to purchase said road in such a manner as prescribed by law.”

The record discloses a conflict in the testimony as to just how wide this plank road, as it is called, was opened, witnesses for plaintiff testifying that it was opened to a width of at least 40 feet, and a witness on behalf of defendant testifying that it was opened at least 60 feet in width. The law at that time provided that turnpikes should be not less than 33 feet nor more than 60 feet in width. There is no question but that it was actually improved in front of the property of plaintiff to a width of at least 24 feet.

July 2, 1856, a plat of John Morten's 65 acre tract was prepared and placed on record in the county recorder's office on August 14, 1856, which divided said tract into six lots, one of which contained 15.97 acres, marked “reservation, homestead lot,” and the other five lots numbered consecutively from 1 to 5 were marked with the respective names attached to the plat. The plat as recorded had on its margin the following:

"Plat of partition of the estate of John Morten situate in Section 26, Township 4 (now Spencer), 2nd Fractional Range, Miami Purchase, 4 miles north of Cincinnati on actual survey. (Whole tract containing 65.75 acres.)" R. C. PHILLIPS, *Surveyor*.

"Cincinnati, July 2d, 1856.

"We, the undersigned, the heirs of John Morten, agree that this plat in partition of the lands of said John Morten, as surveyed and set out by R. C. Phillips, Surveyor, is satisfactory to us and we do hereby adopt the same, and bind ourselves, our heirs and assigns to abide by it.

"In testimony witness our hand and seal.

"ANDREW G. MORTEN (Seal.)

"CHARLOTTE B. CRYER (Seal.)

"MARY ANN MORTEN (Seal.)

"THOMAS H. MORTEN (Seal.)

"THOMAS CRYER, in trust, etc., for
M. G. and T. E. Morten (Seal.)

"Scale 1 inch to 200 feet.

"R. C. PHILLIPS, *Surveyor*."

This plat delineates streets without giving the width thereof, but it is drawn to a scale, one inch to two hundred feet. Along the northern boundary of the Morten land the plat shows from the northwest corner to the angle at the north end of plaintiff's property, the road which is now Observatory avenue marked "plank road," and east of that point the same road, now Observatory avenue, marked "county road." It also shows a stone in the center of this road 39.75 feet from the west line of lot numbered 2, and a road marked "plank road" extending south 38 degrees east 937 feet, to the south line of said Morten tract. The width of this road not being fixed in figures as above stated, scales slightly over 60 feet.

A deed was executed by John Morten and his wife, of general warranty, conveying Lot Number 2, as shown on this plat, to Mary Ann Morten, by the following description:

"All that certain lot or tract of land, situated in the county of Hamilton and state of Ohio, in section twenty-six (26) township four (4) and second (2d) fractional range in the Miami purchase, and known and designated as 'lot No. two (2) on Plat in Partition the lands of John Morten' recorded in Plat Book

1914.]

Hamilton County.

No. 1, page 281, Hamilton county records, bounded and described as follows, to-wit:

"Beginning at a stone in the north boundary line of said section twenty-six (26) and eastwardly from the N. W. corner thereof one thousand and thirty $89/100$ feet (1030.69) being the N. E. corner of lot No. one (1) this day deeded to Thomas Henry Morten, thence with said section line S. $89^{\circ} 12'$ E. thirty-nine $75/100$ (39.75) feet to a stone in the section line and the angle of the plank road, thence along the center of the plank road S. 38° E. nine hundred and thirty-seven (937) feet to a stone, thence S. $38'$ W. three hundred and twenty-nine $80/100$ (329.80) feet to the south line of said Morten's land and to a stone therein, thence along the said south line N. $89^{\circ} 12'$ W. six hundred and twenty-nine $26/100$ feet to a stone at the S. E. corner of lot No. one (1) N. $0^{\circ} 38'$ E. one thousand and seventy-two $80/100$ feet to the stone at the beginning, containing ten and $46/100$ acres (10.46) of land."

On the same day a deed of special warranty was executed to Mary A. Morten by Thomas H. Morten and the other so-called heirs of John Morten, for the same lot, No. 2, under the same description. These deeds were both placed of record on the same day the plat was recorded.

Mary A. Morten, who became the wife of Samuel A. Leeds, thus became the owner of this tract of land known as Lot No. 2, and the plaintiff, her stepdaughter, holds her title under a deed from Mary A. Leeds and husband, which describes the east line as the center of Linwood road.

After the territory which included this property had been annexed to the city of Cincinnati, its platting commission on February 4, 1875, in pursuance of law, made a plat of this Section, on which Linwood pike is shown as a dedicated street to a width of 60 feet, on the same location as shown on the plat of John Morten's estate above referred to. In 1880 the interests of the turnpike company were sold under foreclosure proceedings and conveyed by the sheriff to Samuel M. Ferris, under a description which located the road, but did not fix its width. On February 18, 1897, Samuel M. Ferris conveyed to the city of Cincinnati the Linwood pike under a deed which fixed its center line by courses and distances, and conveyed a strip

of land 30 feet wide on each side of the center line, the part through the property under consideration coinciding and referring to the plat made by the platting commission.

In 1905 the city improved said Linwood pike to the width of 60 feet, and in so doing caused the fence and certain trees and shrubbery to be removed from between the lines of the road so fixed. The fence as it existed at the time the city commenced its improvement, according to plaintiff's testimony, stood on the same line that an old fence had existed for many years, and was on a curved or crooked line extending in its widest part about 29 feet into said highway as so improved, and running from that to a width of nothing at each end.

The petition below stated two causes of action: The first cause asked compensation for the strip of land included within plaintiff's fence and the west line of said Linwood road, and for certain trees and shrubbery thereon. And the second cause of action asked for damages by reason of the change of grade of Linwood road, which made a cut in front of plaintiff's property.

In the trial below, at the conclusion of the plaintiff's testimony defendant moved to arrest the evidence from the jury, and that judgment be given for the defendant separately in each cause of action, both of which motions were overruled.

After the defendant introduced its evidence and plaintiff introduced her evidence in rebuttal, the defendant again moved that the evidence on each of the two causes of action be arrested from the jury and judgment be entered for defendant. The court refused to arrest the evidence on the first cause of action, but granted the motion on the second cause of action, and made an order dismissing the second cause of action from the case, to which plaintiff excepted.

On submission, the jury rendered a verdict for \$1,100 in favor of the plaintiff on the first cause of action, whereupon defendant moved for a judgment notwithstanding the verdict, and also filed a motion for new trial, and plaintiff made a motion to set aside the order dismissing the second cause of action and for a new trial of said second cause of action. All these mo-

1914.]

Hamilton County.

tions were overruled by the court, and judgment was entered on the verdict for plaintiff on the first cause of action.

A bill of exceptions containing all the evidence in the case was taken, and a petition in error was filed by the defendant, seeking to set aside said judgment, and a cross-petition in error was filed by the plaintiff asking a reversal of the judgment entered against her on the second cause of action.

The question first to be determined is, the rights of the public in Linwood road, whether or not it is a dedicated street, and if so, to what width.

As was said by the Supreme Court in the case of *Village of Fulton v. Mehrenfeld*, 8 O. S., 440:

“Dedication of ground for public uses may be made in Ohio either by the statute or according to the rules of common law.”

The record here fails to show a statutory dedication. The plat of partition of the John Morten estate was not signed by the owner of the fee, nor was it acknowledged. If it had been signed and acknowledged by the owner of the fee, it, in itself, followed by the public use of the plank road, would have effected a statutory dedication.

While John Morten did not himself sign this plat, it was signed by his children and “heirs,” who became at the same time his grantees, and his deed to Mary A. Morten described the property conveyed by reference to that plat, and its description referred to this plank road in such a manner as to show the adoption of that plat by him. And the deed from Mary A. Morten Leeds and husband to the plaintiff below also refers to and uses the center of Linwood road as a part of its description.

No particular words or ceremonies, or form of conveyance is necessary to render the act of dedicating land to public uses effectual. Anything which fully demonstrates the intention of the donor, or the acceptance by the public, works that effect. *LeClercq v. Gallipolis*, 7 Ohio, pt. 1, 220.

It has been repeatedly held that where the owner of real property makes and records a plat showing streets, highways

or public squares, and sells land with reference to that plat and the streets, highways or public squares thereon are used by the public, that he thereby dedicates them to the public. And this is true whether the plat is properly executed and acknowledged or not. *13 Cyc.*, 455, and cases cited; *Darber v. Scott*, 3 C. C., 313; *Wright v. Oberlin*, 23 C. C., 509, 511; *Doren v. Horton*, 1 Dis., 401, 404; *Brown v. Manning*, 6 Ohio, 298, 303; *Huber v. Gazlay*, 18 Ohio, 18.

While the record does not clearly show that there was in existence a public highway on this line prior to the construction of the plank road or turnpike, it is clear that from a time earlier than 1856, when this Morten plat was made, there was a traveled highway known as the "plank road" upon that line.

Under the authorities we are of the opinion that the Morten plat and deeds above referred to, taken in connection with the use by the public of the highway shown as the plank road, known now as Linwood road, operated as a dedication of the same to public use, and this notwithstanding the fact that at the time of making that plat the road on that line then in existence was under the control of the turnpike company.

While a turnpike may be owned and operated by a private corporation, it is still a public highway. A turnpike road can only be constructed and operated under authority of law, and when used by the public it becomes a public highway. The purpose and object of a turnpike is merely to provide a public highway of a better quality than would be furnished by an ordinary county road, and it is maintained by tolls instead of by public taxes. It is not in any sense a private road or way; it could not be closed by the stockholders or corporation against the public use; it is constructed under or by virtue of public authority for the use of every person who desires to pass over it, on the payment of the toll established by law, and its use is common to all who comply with the law. The easement enjoyed by the public in a turnpike road is vested in the public, as much as that of a common highway. If for any reason the turnpike should be abandoned as such, it would still remain a public highway. *R. R. v. Commonwealth*, 104 Penn., 583; *State*

1914.]

Hamilton County.

v. *Maine*, 27 Conn., 41; *People v. Davidson*, 79 Cal., 166; *Com'rs. v. St. Rd. Plank R'd Co.*, 1 N.P.(N.S.), 143 (aff'd by Supreme Ct.); *Chagrin Falls & Cleveland Plank R'd v. Cane*, 2 O. S., 419.

Some question is raised in the brief of the defendant in error as to the sanity of John Morten at the time of the making of this plat and deeds, but the only evidence on this subject shown in the record is on page 156, where his daughter made the statement, in answer to a question as to how her father felt about this road going through this farm: "Well, it worried his mind so that he was obliged to go to the insane asylum." This testimony is certainly not sufficient proof that the grantor in the deed under which she claimed title and under which plaintiff in error holds, was, at the time of its execution, *non compos* to such an extent that it would invalidate the deed or the plat which he adopted in the making of that deed; and plaintiff below as the grantee of her mother's deed which described the premises conveyed to her as bounded by the center line of Linwood road, was bound to take notice of the existence of that highway and is chargeable with knowledge of its location. *Seegar v. Harrison*, 25 O. S., 14.

Plaintiff below, however, claimed that the highway which existed along the eastern boundary of her property was limited to the portion actually used, and that she was the owner of the 23/100 acres described in the petition which lay between the line of her fence and the west line of Linwood road to a width of 60 feet as improved by the city.

It is well settled in Ohio that an abutting property owner can acquire no right in a public highway by encroachment or occupation however long continued, where such encroachment or occupation is of a temporary character such as fences, walls, shrubbery, etc., and is upon that part of a street not then required for public use. *Lane v. Kennedy*, 13 O. S., 42; *McClelland v. Miller*, 28 O. S., 488; *Ry. v. Comm'rs*, 31 O. S., 338; *Ry. v. Comm'rs*, 35 O. S., 1; *Heddleston v. Hendicks*, 52 O. S., 460; *Ry. v. Elyria*, 69 O. S., 414.

The deed under which plaintiff below held title fixed the center of this road as but one foot from her fence. It was conceded by her that the road was at least 40 feet wide. She therefore could make no claim that the entire 23/100 acres was her property from occupation, being simply enclosed by a fence for a dooryard of her residence. It is true the width of the road is not shown on the plat in figures, but as the plat was drawn to a scale it could be ascertained as accurately as though marked in figures, and the plat has thus fixed the width. *Zeller v. Littell*, 58 Atl., 377.

Where a plat thus fixes the width of a highway, and the public uses only so much of it as might be necessary for the public travel at that time, its use will be held an acceptance of the street to its entire width fixed by dedication. This law is well stated in 13 Cyc., 488, as follows:

"If a street is dedicated by the platting of land into blocks and lots intersected by streets and the sale of lots with reference to the plat, the width of the street is that fixed by the plat or map, and the failure to open and improve the street for its whole width does not operate as an abandonment of the part not opened and improved. So, if a highway of a definite width has been commenced by an actual and recorded location, by proceedings not strictly conformable to law, the public after twenty years user is entitled to a way of the width originally laid out, although the part traveled during that time may not have been so wide, and where a public street becomes such by dedication followed by an acceptance by use, the location of the street as delineated by the stakes which were set in the act of dedication according to which the street was opened and used, determines the lines of the dedication." *Lins v. Seefeld*, 126 Wis., 610, 614; *Ky. v. Ferris*, 93 Cal., 263, 264; *Commonwealth v. Shoemaker*, 14 Pa. Super. Ct., 194.

We therefore conclude that Linwood road was a dedicated highway within the lines to which the city made its improvement, and plaintiff below failed to sustain her first cause of action against the city, and the court below erred in not upon its motion withdrawing the case from the jury and entering a judgment for defendant.

1914.]

Licking County.

As the record fails to show that any claim was filed for damages by reason of change of grade in the improvement of Linwood road, as required by Section 3823 of the General Code, the action of the court below was correct in withdrawing the second cause of action from the jury and entering judgment thereon for defendant.

The judgment below will therefore be reversed as to the first cause of action, and sustained as to the second cause of action, and final judgment will be entered for plaintiff in error.

ESTOPPEL THROUGH ACQUIESCENCE IN A BOUNDARY LINE.

Court of Appeals for Licking County.

EDWARD S. RUTLEDGE V. THE PRESBYTERIAN CHURCH
OF JOHNSTOWN, OHIO.

Decided, April Term, 1914.

*Boundary—Held to be Where the Parties Have Long Believed It to Be
—Rather than on the Line Shown by a Survey.*

The boundary line between the lands of two adjacent owners may be determined by agreement or acquiescence for so long a period of time as to estop either of the owners from asserting that the true boundary is on a different line.

A. A. Stasel, for plaintiff.

Fitzgibbon, Montgomery & Black, contra.

POWELL, J.; VOORHEES, J., and SHIELDS, J., concur.

The plaintiff, for his cause of action, sets out in his petition that he is the owner of certain real estate in the village of Johnstown, this county, describing the same. He alleges that he is in possession of such real estate, and that he, and those through whom he claims title, have been in possession thereof for more than forty years. He alleges that the defendant is a church organization and a church corporation; that the defendants, McCurdy, Ross and Densmore are the trustees of such

corporation; that they are constructing a church edifice upon the lands lying immediately north of his lands which are described in the petition, and they claim the right to go upon the land of plaintiff and construct such church building upon some five feet thereof; that they threaten to cut down certain fruit and shade trees standing upon his land, and remove a building thereon used by him for storing coal; that they threaten to forcibly take possession of said land and building, and destroy his improvements thereon; that they threaten to do this under a claim of right, and that, unless restrained, they will so enter upon his land and build a structure thereon, to his irreparable damage. He prays for an injunction. A temporary injunction was allowed and a motion was filed to dissolve the same. The cause was heard upon such motion, although the defendants, at the same time that they filed their motion to dissolve the injunction, filed an answer and cross-petition to the petition of the plaintiff. An appeal was taken from the order of the court of common pleas to this court, where the same was heard upon such motion and the evidence adduced in support of the same.

It is disclosed by the evidence that the defendant is the owner of the lands described as follows:

Situated in the county of Licking, state of Ohio, and in the village of Johnstown, and being a tract or parcel of land lying and being in the state of Ohio, and county of Licking, being a part of a town lot lying in the northeast corner of lot No. 8, second range of house lots in the village of Johnstown, Ohio, beginning at the northeast corner of said lot; thence running south, forty degrees east, four rods; thence south, fifty degrees west, seven rods; thence north, forty degrees west, four rods; thence running north, fifty degrees east, seven rods to the place of beginning, containing twenty-eight rods of land.

Between the lands of plaintiff and the church lot, it appears that a fence had formerly been erected, and as claimed by the defendant, it lived the usual life of a picket fence, and then disappeared. Such fence was an extension of the north line of a coal house standing upon the plaintiff's land, but which abutted upon the lands of the defendant. On the north side of the lands

1914.]

Licking County.

of plaintiff had been planted certain fruit trees, which were still standing at the commencement of this action. The testimony discloses that said fence was built where it stood in the neighborhood of forty years or more ago; that after it had worn out, no new fence was erected in its place, but that the ground stood open between the land of the plaintiff and the lot of the defendant. The testimony discloses that the fruit from the trees which stood on the south side of the old fence was claimed by the parties then owning the land of the plaintiff, and who claimed to own the same; that the trees were planted by them; that the coal house was used by plaintiff's predecessors in title, and was built by them where it now stands, and the plaintiff continued the use of such coal house and still uses the same. It further appears from the testimony of certain witnesses that when such fence was standing it stood between the trees on the south side and the church upon the north side of such fence; that they had stood on the fence and gathered fruit off of the trees, and at the same time could reach over and touch the church building on the north side of such fence; and that the same evidently had been used as a dividing line between the property of plaintiff and defendant.

It further appears by a recent survey that the south line of the church lot was found to be from five to seven feet south of where such old fence had stood. It is claimed by the defendant that such strip of ground, five to seven feet south from where such old fence stood is, a part of said lot.

It is well settled that a line may be established by an agreement of parties and occupancy of such land for a long period of years; and that when a line is so established by prescription, it continues to be the line between the lands of the parties abutting thereon. We think this rule applies in this case. The line was established or acquiesced in, at least, for a long period of years and was never questioned until a new survey was made, and such acquiescence would constitute an estoppel against either of the parties owning lands on either side of such line from asserting a claim to any other land, even though it should be determined not to be the true line by a survey thereof.

As was said by Judge Cooley in a Michigan case: "In cases of this kind, it is not so much as to where the true line is, as to where the parties have agreed that it is, and have made their improvements in reference to such agreed line."

We think that is the rule that applies in this state, and that a line can be determined or agreed upon, or at least acquiesced in, for such a period of time as to constitute an estoppel against claiming any other line as the true boundary.

The motion to dissolve the temporary injunction will be overruled. Exceptions may be noted.

DETERMINATION AS TO TESTACY.

Court of Appeals for Licking County.

GILBERT B. GOFF V. JAMES K. MOORE ET AL.*

Decided, April Term, 1914.

Descent—Devise of Life Estate But Not of Fee—How the Fee Passes in Such a Case—Wills—Sections 8574 and 8577.

The relict of a deceased husband or wife, who leaves a will bequeathing a life estate only, permitting the fee to go where the statute sends it, dies intestate as to real estate inherited from such deceased husband or wife, and in consequence the title to such real estate passes under the provisions of Section 8577 and not under Section 8574.

A. A. Stasel, for plaintiff.

Flory & Flory and Kibler & Kibler, contra.

POWELL, J.; VOORHEES, J., and SHIELDS, J., concur.

So much of the facts in this case as are necessary to understand the issue involved are as follows:

Abner Goff died in 1896, intestate and without issue, leaving Martha Goff, his widow, surviving him. She was his sole heir at law. At his death he was seized in fee simple of 162 acres

*For opinion below see *Goff v. Moore*, 11 N.P.(N.S.), 543.

1914.]

Licking County.

of land in this county, which is the subject of this controversy. Martha Goff, his widow, died in May, 1907, seized of the real estate which had descended to her from her said husband, Abner Goff. Martha Goff left a will, by the terms of which she gave a life estate in said lands to her brother, Ensley Finney Haas, but made no disposition of the remainder in said lands after the termination of said life estate. The item of the will of Martha Goff disposing of said real estate is as follows:

“First: I give and devise to my brother, Ensley Finney Haas, to have and to hold during his natural life, all of the farm with its appurtenances which was owned by my husband, Abner Goff, at the time of his death, and of which I became seized as his widow, consisting of 162 acres, more or less, and situated in Washington township, Licking county, Ohio.”

There is no other reference in her will to this real estate. Ensley Finney Haas was the sole heir at law of Martha Goff, and he died shortly after the death of his sister, Martha Goff, leaving a will by the terms of which he gave the residuum of his estate to the defendant, Allen B. Gregg. This action is for partition of the lands described, and being the 162 acres mentioned above. An issue was made by the pleadings as to the descent of the title to this land from Martha Goff, and this is the question to be determined in this action.

Martha Goff took title to this land by virtue of Section 8574 of the General Code. At her death intestate and without issue, it would pass one-half to her brothers and sisters, and one-half to the brothers and sisters of her deceased husband, Abner Goff. If she should dispose of it by will or deed, of course, it would descend according to the terms of such deed or will. This, however, she did not do. The question peculiar to the case is whether or not Martha Goff died intestate, or testate, so as to control the descent of this land from her. It is conceded that in either event one-half of the land would descend to her brother, Ensley Finney Haas, he being her sole heir at law, and the same would pass under his will to the defendant, Allen B. Gregg. But what of the other one-half? She died leaving a will, but she did not dispose of the fee of this land in her

said will. If she died intestate, the second half of this land would pass to and vest in the brothers and sisters of Abner Goff, deceased, under Section 8577 of the General Code. If she died testate, the land would not pass under Section 8577 at all, but according to the terms of her said will. If she died testate, but without disposing of said lands in her said will, it is claimed that they would pass, not under Section 8577, but under Section 8574, to which it is held 8577 is supplementary. If said lands passed from Martha Goff under Section 8574, the whole of said lands would descend to her brother, Ensley Finney Haas, and no part thereof would pass to the brothers and sisters of her deceased husband, Abner Goff. But is this the true construction of said sections, or the true construction to be given to the words "die intestate," as used in Section 8577? This court is of the opinion that such is not the true construction to be given to these words. The word "intestate," as used in Section 8577, does not apply to the person alone, but to the property of which such person may die seized. Martha Goff died testate; that is, she died leaving a last will and testament, which was afterwards duly admitted to probate and record in the probate court of this county. She also died intestate as to the fee in this 162 acres of land, which had descended to her from her deceased husband. The word "intestate" not only applies to a person dying without a will, but applies also to any property which descends under and by virtue of the statutes and not by the terms of any last will and testament.

It is the opinion of the court that Martha Goff died intestate as to the real estate which she inherited from her husband, and that the title to such real estate would pass and descend in accordance with the terms and provisions of Section 8577, and not according to the terms and provisions of Section 8574. Or, in other words, the one-half of this land will pass and descend as intestate property to the brothers and sisters of said Abner Goff, deceased, or to their legal representatives and a partition of the same will be ordered as prayed for by them.

The cause will be remanded to the court of common pleas to carry this order of partition into effect.

1914.]

Cuyahoga County.

**WHEN IT IS THE DUTY OF THE COURT TO DIRECT A VERDICT
FOR THE DEFENDANT IN A NEGLIGENCE CASE.**

Circuit Court of Cuyahoga County.

JOHN GUTT V. PENNSYLVANIA COMPANY.

Decided, May 27, 1912.

Construction of Section 9018, General Code—Negligence and Contributory Negligence for Jury—No Evidence of Defendant's Negligence—Duty to Direct Verdict.

The requirement in Section 9018, General Code, that in all actions brought against a railroad company for personal injury to an employee, all questions of negligence and contributory negligence shall be for the jury, assumes that there must be evidence tending to establish negligence on the part of the defendant, and if the undisputed facts in the case do not tend to show that the defendant has been guilty of negligence, there is no question of fact to be submitted to the jury, and it is the duty of the court in such case to apply the law to the undisputed facts and direct a verdict for the defendant.

*S. Doerfler and C. W. Dille, for plaintiff in error.**Squire, Sanders & Dempsey, contra.*

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The action, out of which this proceeding in error arises, was begun in the court of common pleas by John Gutt to recover damages from the Pennsylvania Company on account of personal injuries sustained by him while a brakeman in the company's employ.

On the trial of the case in the court below, the court on motion of the defendant directed a verdict for said defendant at the close of the plaintiff's evidence.

The plaintiff's motion for a new trial was overruled and judgment entered against him on the verdict.

A reversal of this judgment is now sought by the plaintiff in error on the ground that the court erred in directing a verdict in the manner indicated.

The only witness who testified on behalf of the plaintiff was the plaintiff himself. It appears from his testimony that on the night of July 25, 1910, he was in the performance of his duties as yard brakeman for the defendant, assisting in the work of taking a train of coal cars out of the defendant's Bedford yard, seven or eight miles from Cleveland; that his duties in general were to couple up cars, pass signals and assist in the switching of cars; that on this particular occasion he was instructed by the conductor in charge of the train that was being switched, to station himself near the head end of the train, and await a signal to be given by the conductor, who then went to the other end of the train, composed of about forty cars, to see that the right-of-way was clear; that the plaintiff then sat down on a switch stand about fifteen or twenty feet from the end of the engine, and about two feet and a half from the track on which the train was to be moved; that the head end of the engine was coupled to the train, and the headlight attached to the back of the engine; that while the plaintiff was sitting on the switch stand he became unconscious and while in a state of unconsciousness his hand rested upon or close to one rail of the track; that the train was started by the engineer while the plaintiff was in this position, resulting in his hand being run over by the train and causing the injuries for which he sought to recover damages in the court below.

There was no evidence tending to show that the engineer knew of the plaintiff's position of peril, but there was evidence tending to show that if the engineer had looked ahead on the track he might have discovered the plaintiff's situation. A rule of the company was also introduced in evidence whereby an engineer is required to keep a constant lookout on the track for signals and obstructions.

On this state of facts it is contended for the plaintiff in error that the case should have been submitted to the jury.

In *Erie Railroad Co. v. McCormick*, 69 O. S., 45, a case identical in principle with the one before us, it was held, quoting from the syllabus, paragraph 3:

1914.]

Cuyahoga County.

“In an action against a railroad company by one who, by his own fault, is upon its tracks and in a place of danger, to recover for a personal injury caused by the failure of its employees operating one of its trains to exercise due care after knowledge of his peril, it is necessary to show actual knowledge imputable to the company.”

Unless the law, thus laid down by the Supreme Court, has been modified by the enactment of the statute of February 28, 1908 (99 O. L., 25), it must control the decision in this case. Section 2 of that act, which is Section 9018, General Code, provides:

“In all actions hereafter brought against a railroad company operating a railroad in whole or part within this state, for personal injury to an employee or where such injuries have resulted in his death, the fact that he was guilty of contributory negligence shall not bar a recovery when such negligence was slight and that of the employer greater, in comparison. But the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.”

The effect of this statute is to relieve the plaintiff who seeks to recover damages from the defendant on account of the latter's negligence, of the consequences of his own contributory negligence. All questions of fact relating to negligence and contributory negligence are to be submitted to the jury. The statute does not, however, attempt to define negligence, nor to take from the court the power of passing upon questions of law. The requirement that all questions of negligence and contributory negligence shall be for the jury, assumes that there must be evidence tending to establish negligence on the part of the defendant. If the undisputed facts do not tend to show that the defendant has been guilty of negligence, there is no question of fact to be submitted to the jury, and it is the duty of the court in such case to apply the law to the undisputed facts and direct the verdict for the defendant.

Referring again to *The Erie Railroad Co. v. McCormick*, *supra*, we find in the opinion on page 53, this language:

“The concrete rule upon this subject is, that if one is upon the track of a railway company by his own fault, and in peril of which he is unconscious, or from which he can not escape, and these facts and conditions are actually known by the engineer, it is his duty to exercise all reasonable care to avoid the infliction of injury. It does not impose the duty to exercise care to discover that one so upon the track is in a place of danger, but it does impose a duty to be exercised upon actual discovery.”

Under this rule of law laid down by the Supreme Court, there is not any duty imposed upon a railroad company of exercising care to discover one who is by his own fault upon the tracks of the company and in a place of danger, of which he is unconscious, and from which he can not escape. There being no such duty, a failure to use such a care is not actionable negligence. The duty of using ordinary care, to avoid injuring such a person begins only with actual discovery, and for the violation of such duty a right of action would exist in favor of the one injured.

This being the law announced by the Supreme Court, we are, of course, bound to follow it, whatever may be our views as to what we think the law on this subject ought to be.

Applying the principle of the case of *The Erie Railroad Co. v. McCormick*, *supra*, to the facts in this case, it is apparent that, since there was no evidence tending to show actual knowledge imputable to the company of the plaintiff's presence on the track, there was as a matter of law no actionable negligence on the part of the company shown, and no question of fact to be submitted to the jury.

If it should be admitted that the plaintiff was upon the track in an unconscious condition without fault on his part, as is claimed on his behalf, and therefore not guilty of contributory negligence, the evidence would still fail to disclose a situation tending to establish negligence on the part of the defendant company. His position in that event would be analogous to that of a mere licensee, and the company's duty to use reasonable care to avoid injuring him would begin only upon discovery of his position by some one whose knowledge would be imputed to the company. Such is the holding in *The Cleveland, Akron & Columbus Railway Co. v. Workman, Admr.*, 66 O. S., 509.

1914.]

Lucas County.

The trial court committed no error in directing a verdict for the defendant, and the judgment is affirmed.

PROSECUTION FOR PROCURING A MISCARRIAGE.

Circuit Court of Lucas County.

MARY BRIDGE v. STATE OF OHIO.*

Decided, February 24, 1912.

Criminal Law—Proof of Negative Averment Under the Statute Relating to the Procuring of a Miscarriage—Newly-Discovered Evidence Not a Ground for a New Trial, When.

While it is incumbent on the state in order to convict in an indictment under General Code 12412, for procuring an abortion, to prove that the same was not necessary in order to preserve the life of the mother, the state is not required to prove that such act was not advised by two physicians to be necessary for such purpose, as this latter negative averment may be easily shown by the defendant, while it would be very difficult, if not impossible, to be established by the state.

Ulery & Merrill, for plaintiff in error.

Holland C. Webster, Prosecuting Attorney, and *Roy Stuart*, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the Court of Common Pleas of Lucas County.

The plaintiff in error was convicted in the common pleas court under General Code, Section 12412, of procuring a miscarriage upon the body of one Minnie Parrish, and was sentenced to the penitentiary for a period of five years. The bill of exceptions contains all of the evidence upon the trial of the case, and all of the evidence which was offered upon a motion for a new trial, filed in the common pleas court.

It is contended by counsel for Mary Bridge that the conviction was wrong and that she is entitled to have the same re-

*Affirmed without opinion, *Bridge v. State*, 87 Ohio State, 464.

versed by reason of the fact that the record contains no evidence to substantiate the negative averments contained in the statute and in the indictment. The statute to which reference has been made authorized a conviction "unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose, if the woman either miscarries or dies in consequence thereof."

Of course this provision which has just been quoted may be sustained by any competent evidence, and with a view to ascertaining whether it is sustained, we have very carefully examined the evidence and find abundance of evidence warranting the jury in so concluding. Indeed, there is nothing in the evidence relative to the condition of Minnie Parrish at the time of the operation that in any wise tends to show any necessity for the performance of the operation in order to preserve her life.

It appears from the evidence that she, at some time before the operation, consulted with two physicians and she states in her evidence that they had not advised her to have a miscarriage performed for the purpose of saving her life. We think no error was committed by the trial court in allowing that evidence. While the duty devolved upon the state, under authority of *Moody v. State of Ohio*, 17 O. S., 111, to prove the negative averment, yet the burden of proving that branch of it which relates to the advice of physicians would not, by the language of the case just cited, be cast upon the state.

The defendant in the common pleas court, within three days after the verdict of guilty was rendered, made a motion for a new trial, one ground of which was based upon the claim of certain newly-discovered evidence. Upon the hearing of that motion, she called to the stand one of the assistant prosecuting attorneys and sought to show by him that he was present before the grand jury when Minnie Parrish testified and that she had there given a different version of the case from that testified to by her on the trial. The bill of exceptions contains a statement of the evidence expected to be shown, and it is not of such a character as would have justified the trial court in granting the motion. The evidence, if introduced, would have a tendency to

1914.]

Cuyahoga County.

impeach the testimony of Minnie Parrish, and to have cast upon her testimony the suspicion that attends the statements made by an accomplice, as indicated in *State v. McCoy*, 52 O. S., 157. Such evidence would not, in view of the other evidence contained in the record, have required a different verdict upon a retrial of the case. It seems to us, on the contrary, that if there had been a re-trial, and if upon such re-trial this impeaching evidence had been introduced, that the same result would necessarily have been reached. The rule that a new trial will not be granted on the ground of newly-discovered evidence, unless such evidence would require a different verdict, has often been laid down by this court, and is sustained by many reported cases. We cite only, *Cincinnati Traction Co. v. Fesler*, 31 C. C. Reports, 631, and *C., C. & St. L. Railroad Co. v. Long*, 24 O. S., 133.

The record in this case fails to disclose any act of diligence on the part of plaintiff in error in seeking to discover the evidence upon which she relied for the granting of her motion for a new trial.

For the reasons given, and finding no error to the prejudice of plaintiff in error, the judgment of the court of common pleas will be affirmed.

**EMPLOYEE RELIEVED FROM HIS AGREEMENT BY HIS
WRONGFUL DISCHARGE.**

Circuit Court of Cuyahoga County.

THE JEWEL TEA COMPANY V. WM. J. WILSON.

Decided, June 18, 1912.

Agreement Not to Engage in Business—Employee Wrongfully Discharged—Agreement Not Enforced.

Where an employee under agreement not to engage in the same business in the same city for one year after leaving his employment, is wrongfully discharged by his employer, his agreement will not be enforced against him.

White, Johnson & Cannon, for plaintiff.

H. C. Boyd, contra.

**AS TO APPLICATION OF THE COMPARATIVE NEGLIGENCE
STATUTE.**

Circuit Court for Lucas County.

MARGARET HILL, AS ADMINISTRATRIX OF THE ESTATE OF JOHN E.
HILL, DECEASED, v. THE PERE MARQUETTE
RAILROAD COMPANY.*

Decided, January 13, 1912.

*Negligence—Switchman Struck by Locomotive—Engineer Had Been on
Duty More than Fifteen Hours—Contributory Negligence of the De-
cedent—Restriction in Application of the Comparative Negligence
Statute.*

1. Where the evidence shows that the decedent switchman met his death through his own contributory negligence, the fact that the engineer of the locomotive which struck him had been on duty for more than fifteen consecutive hours without an interval of eight hours rest, in violation of Section 9007, General Code, does not operate to render the railroad company liable.
2. Section 9018, General Code, introducing to a limited extent the doctrine of comparative negligence, is not applicable to an accident occurring before its passage, notwithstanding it contains the provision that the statute shall apply to all actions "brought" after its passage.

O. S. Brumback, for plaintiff in error.

J. H. Tyler, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the Common Pleas Court of Lucas County.

The plaintiff in this case was plaintiff in the court of common pleas and brought the action in that court for the purpose of recovering damages by reason of the death of John E. Hill, alleged to have been caused by the negligence of the railroad company.

*Judgment of Court of Appeals affirmed by Supreme Court (no opinion), 88 O. S., 599.

1914.]

Lucas County.

The injury resulting in the death of Mr. Hill occurred at 1:15 o'clock in the morning of November 16, 1907, in the railroad yards of the defendant company in the city of Toledo. Hill was a switchman in the employ of the railroad and on the occasion under consideration he was riding upon a foot-board at the rear of the tender while the engine was proceeding forward down the lead track for the purpose of doing some switching on siding No. 13. The switch being open to siding No. 9 the engine ran in on that siding a short distance—the error being promptly discovered and the engine stopped. Whereupon, it seems that Hill stepped off immediately behind the tender. The engineer, without being signalled so to do and without giving any warning by ringing the bell or otherwise, started the engine backward and it ran over Hill and killed him.

It appears from the admissions of the answer to the amended petition that the engineer, whose name was Howell, began work at seven o'clock in the morning of November 15, 1907; that he continued at work until noon; that he took one hour for rest and luncheon; that he began work at one o'clock in the afternoon and continued at work until six o'clock of that evening; that he took one hour for rest and supper and began work at seven o'clock in the evening; that he continued to work until midnight at which time he took one hour for rest and luncheon; and that he again began work at one o'clock in the morning of November 16, 1907, and that the injury and death of Mr. Hill occurred some fifteen minutes later.

The court of common pleas at the conclusion of the evidence offered in behalf of plaintiff, directed a verdict in favor of the defendant. It is insisted in this court by counsel for plaintiff that the railroad company is shown to have permitted the engineer to work for fifteen consecutive hours and to then again go on duty without at least eight hours rest, and that such conduct constituted a violation of Section 9007, General Code, and that this resulted directly in the injury of which complaint is made. If it be conceded that the company was violating the section to which reference has been made, it is not apparent

from the record under review that such conduct produced the injury and resulting death of Mr. Hill.

It appears from the testimony of William L. Woodling, who was fireman upon the switch engine, that the engineer during the night was active and on the lookout and attentive to his duties, and this evidence does not seem to be controverted.

The act of Mr. Hill in remaining upon the track immediately behind the tender when, from all the circumstances, he must have known that the engine would immediately back up in order to get on the main lead and proceed forward to siding No. 13, manifests such negligence as would bar a recovery by his administratrix. It is urged, however, in argument that Section 9018, General Code, is applicable to this case, and that therefore the plaintiff should be allowed to recover although Hill was guilty of negligence, his negligence being slight and that of the employer greater in comparison. That section was intended to introduce to a limited extent the doctrine of comparative negligence in actions of employes against their employers, but by its terms is only applicable when the negligence of the employe is "slight" and that of the employer "greater in comparison." It does not appear from the record that the contributory negligence of the employe was "slight" and that of the employer "greater in comparison." Indeed, we do not find any evidence tending to show that the railroad company was guilty of negligence. It is conceded that the engineer was the fellow-servant of the switchman, so that the company would not be liable for any negligence of which the engineer alone may have been guilty.

The section to which reference has just been made, namely, Section 9018, was enacted by the General Assembly of Ohio on February 28, 1908, 99 O. L., 25, while the injury and death of Mr. Hill occurred upon November 16, 1907. We think for that reason the section can not be applied to this case. If the railroad company immediately after the injury had a good defense under the then existing law by reason of the negligence of Hill having contributed directly to his death, the right to that defense was a vested right which could not thereafter be taken away by statute. It is true the section by its terms purports to apply to

1914.]

Cuyahoga County.

all actions brought after its passage, but it must, in order to avoid the constitutional inhibition against retroactive laws, be held to apply only to such causes of action as may arise after its passage. *Constitution of Ohio*, Article II, Section 28; *Commissioners v. Rosche Bros.*, 50 O. S., 103; *Cooley on Constitutional Limitations*, 6th Edition, 455; *Black's Constitutional Law*, 543-544; *Black on Interpretation of Law*, 256, and following.

We find no error of the trial court in the admission or rejection of evidence. Counsel for plaintiff in argument dwelt upon the claimed negligence of the railroad company in failing to have the bell ringing attachment in order; it being claimed by him that the attachment was intended to work automatically, but was so defective that it would not work in that manner. It is sufficient to say that the amended petition contains no allegation that the company was negligent in that respect, and that while the bell would not ring automatically, it was in such condition that it could readily be rung by the hand with the use of a rope supplied for that purpose.

The circumstances of the case as disclosed by the evidence preserved in the record indicate to our minds that if the case were re-tried and the issues submitted to a jury, the result would not be different, and therefore that substantial justice has been done to the plaintiff in error.

The judgment of the court of common pleas will be affirmed.

RIGHTS OF ATTORNEY CLAIMING INTEREST IN JUDGMENT.

Circuit Court of Cuyahoga County.

HARRY KOBLITZ V. LIZZIE BARTLETT ET AL.

Decided, June 17, 1912.

Attorney Claiming Interest in Judgment—Not a Party—Can Not Prosecute Error.

An attorney claiming an interest in a judgment rendered in favor of his client, but not a party to the action in which it was recovered, can not prosecute error proceedings in his own name to any order of the court made in said action.

F. A. Henry, for plaintiff in error.

Wing, Myler & Turney, contra.

NIMAN, J.; MARVIN, J., and METCALFE, J. (sitting in place of Winch, J.), concur.

The action out of which this proceeding in error arises was begun by the defendant in error, Lizzie Bartlett, to recover from the defendant in error, Theodore Poplowsky, administrator of the estate of Andrew Besenz, deceased, on a claim for caring for the said Andrew Besenz during the period extending from March 10th, 1904, to September 16th, 1907, while he was incapable of caring for himself.

Such proceedings were had in the original action, that the plaintiff recovered of said administrator a judgment for \$1,141.80.

Thereafter the plaintiff, herself, made application for leave of court to remit all her judgment in excess of \$500. This application was granted and she was given leave to, and did remit from the amount of her judgment all in excess of \$628.50. The discrepancy between the amount mentioned in her motion and that contained in the journal entry authorizing the remittitur is probably due to the fact that interest was calculated on the sum of \$500 from the time it became a claim against the estate of Andrew Besenz, deceased. At the time the plaintiff was given leave to remit from her judgment, a former order of the court ordering a remittance from the judgment in like amount on the ground that the judgment was too large, was vacated and set aside as being erroneous.

Harry Koblitz, the plaintiff in error, was not a party to the action below, but it appears from the journal entry that an exception was noted in his behalf, to the action of the trial court in granting leave to the plaintiff to make the desired remittitur.

From the bill of exceptions filed by him, it appears that he was present, by counsel, at the hearing and resisted the plaintiff's application, not on behalf of any party to the action, but on his own behalf. The ground of his objection was that the plaintiff had previously assigned to him as compensation for legal serv-

1914.]

Cuyahoga County.

ices in obtaining the judgment, that portion thereof which she sought to remit.

In his petition in error he sets forth the recovery of the judgment for \$1,141 by Lizzie Bartlett against Theodore Poplowsky, administrator of the estate of Andrew Besenz, deceased, and avers the subsequent assignment to him by the plaintiff below of the judgment in excess of \$500 and the action of the trial court in allowing said plaintiff to remit from the judgment all in excess of \$628.50.

He assigns as error the action of the trial court in permitting the plaintiff to remit from her judgment, and states as follows:

"1. That the said Lizzie Bartlett was not the real party in interest in said judgment at the time of the making of the application and of the making of said remittitur.

"2. That the said Harry Koblitz, plaintiff in error herein, was the real party in interest, and was in fact and in law the owner of said judgment.

"3. That the said order allowing and entering said remittitur is contrary to the evidence introduced in said hearing.

"4. That the granting of said order allowing said remittitur is contrary to law.

"5. That there are other errors in the proceedings apparent in the record, to all of which the said plaintiff in error duly excepted."

It is made to appear that there was no controversy between the original parties to the action over the plaintiff's application. She was anxious to remit from her judgment all in excess of \$500. The defendant could not consistently resist the application, and did not in fact do so.

The plaintiff in error claiming to be the owner of that portion of the judgment sought to be remitted was present in court at the hearing, but the record fails to show that he ever obtained leave to become a party to the action, or that he ever in fact in any way became a party thereto.

We have therefore before us a bill of exceptions, containing the evidence taken at a hearing on an application by a party to the action, and resisted by one claiming an interest in the judgment by assignment, but who was not a party to the action so as to be entitled, as matter of right, to be heard.

We are asked to review a decision of the trial court by one who was a party to the action in which the decision was rendered, and who has no other rights than those possessed by him at the time of the hearing of the court below.

In *Mindock v. Kramer*, 20 C. C., 665, it was held:

“Where a judgment is rendered affecting the interest of a party not a party to the suit, such party is not authorized to institute error proceedings to such judgment.”

We are of opinion that the plaintiff in error, not having been a party to the action in which the decision complained of was made, can not bring the decision here for review.

Even if the plaintiff in error had become a party to the action below, it seems doubtful whether or not he would have accomplished what he desired in the hearing on the plaintiff's application to remit. His controversy is with the plaintiff over the validity of an assignment of that part of the judgment sought to be remitted, a subject entirely foreign to any issue involved in the original action. If that assignment is valid the plaintiff had no power to remit. She could not relinquish rights in something she did not possess, and her act would be a mere nullity. In such event the plaintiff in error still has an enforceable judgment against the defendant below, to the extent of the amount assigned to him. If the plaintiff had the right to remit from the judgment, she needed no assistance of the court to enable her to do so.

The controversy between plaintiff in error and defendant in error, Lizzie Bartlett, would seem to be the proper subject-matter of an independent action rather than one to be settled upon hearing of a motion.

This furnishes an additional reason for holding that the question sought to be raised by this proceeding in error can not be considered on its merits.

The petition in error will, therefore, be dismissed.

1914.]

Cuyahoga County.

THE PROVISION FOR APPEAL WITHOUT BOND VALID.

Circuit Court of Cuyahoga County.

ERNEST J. HULL v. ABRAHAM KAUFMAN ET AL.

Decided, June 17, 1912.

*Municipal Court Jurisdiction—Appeal Without Bond from Justice Court
—Constitutional Law.*

Section 11 of the act creating the municipal court of the city of Cleveland and providing for appeal without bond from a court of a justice of the peace to said municipal court, in certain cases, is constitutional.

H. Preusser, for plaintiff in error.*Joseph Morganstern*, contra.

NIMAN, J.; MARVIN, J., and METCALFE, J., (sitting in place of Winch, J.), concur.

The plaintiff in error recovered a judgment against the defendants in error in the court of R. T. Morrow, a justice of the peace in and for Cleveland township, Cuyahoga county, Ohio. Within five days after the rendition of this judgment the defendants filed notice that they desired to appeal from said judgment to the municipal court of the city of Cleveland. Thereupon said justice of the peace transmitted to the clerk of the municipal court the papers in the action and a transcript of the docket showing the proceedings in the action.

The plaintiff then filed a motion to strike the original papers and transcript of the docket entries in the action, transmitted from the court of said justice of the peace, from the files. This motion was overruled by the municipal court and on error proceedings in the court of common pleas, brought to reverse the decision of the municipal court, the overruling of said motion was sustained. The plaintiff in error now seeks by this proceeding in error to secure a reversal of the judgment of the court of common pleas, affirming the action of the municipal court in overruling said motion.

The facts before us, and the error assigned, call for a determination of the constitutionality of Section 11 of the act creating the municipal court of the city of Cleveland (101 O. L., 364), as amended 102 O. L., 158.

The first paragraph of Section 11 reads as follows:

"In an action in a court of a justice of the peace which is appealable to the municipal court any party thereto may file with said justice, within five days after the rendition of a judgment or the making of a final order therein, a notice in writing that he desires to appeal from said judgment or final order to the municipal court, and forthwith all further proceedings in such action in the court of the justice of the peace shall cease, and the appeal shall be considered as perfected, and the appellant shall not be required to file bond. Said justice shall thereupon immediately transmit to the clerk of the municipal court all papers in said action, a transcript of his docket showing the proceedings and the costs of his court, and any moneys held by him in the action and the justice shall order the constable to turn over any property held by him in the action to the bailiff of the municipal court to be by him held as in like cases originating in the municipal court."

It is contended for the plaintiff in error that this section is unconstitutional, because it authorizes an appeal without bond, and therefore his motion should have been granted.

The section under consideration is claimed to be unconstitutional because, it is said, the subject of appeals from the judgment of a justice of the peace is of a general nature, and all laws dealing therewith must have uniform operation throughout the state, and since this section does not have uniform operation throughout the state, but applies to the municipal court, it violates Article II, Section 26, of the Constitution.

There can be no question of the power of the General Assembly to establish such a local or special court as the municipal court (*State, ex. rel. v. Block*, 65 O. S., 370). The constitutionality of the act creating the municipal court of the city of Cleveland is conceded.

Having power to create such a court, it necessarily follows that the Legislature has power to define its jurisdiction. In exercising this power the Legislature has provided for appeals

1914.]

Cuyahoga County.

from the judgments of justices of the peace to the municipal court, and has authorized the taking of such appeals from the judgments of justices of the peace to the municipal court, and has authorized the taking of such appeals without bond. This in no way interferes with the jurisdiction of justices of the peace from whose courts actions may be appealed. It pertains solely to the jurisdiction of the municipal court, and the jurisdiction of that court is not a subject of a general nature. The fact that in appeals from justice courts to the court of common pleas, bond is required of the party appealing, imposes no obligation upon the Legislature to require bond to be given in appeals to the municipal court.

In omitting to require bond of the party appealing from a judgment of a justice of the peace to the municipal court, the Legislature doubtless had in mind the correction of certain evils believed to exist in the justice court system and to facilitate the appeal of cases to the municipal court. It was a proper exercise of power to provide for appeals without bond, and Section 11 of the act creating the municipal court, as amended 102 O. L., 158, is not unconstitutional.

The argument that the party who has recovered a judgment in the justice court is deprived of his right to have execution on his judgment without security of a bond, in case the losing party appeals to the municipal court, is one more clearly addressed to the justice or policy of the law than to its constitutionality. Moreover, the judgment in such case is not a finality. It is obtained in contemplation of the law relating to appeals and the party obtaining it must be deemed to know that the jurisdiction of the municipal court may be invoked by the losing party.

Judgment affirmed.

SET-OFF DISALLOWED WHERE CLAIMED AGAINST THE ASSIGNEE OF AN INVOICE AND BILL OF LADING.

Circuit Court of Cuyahoga County.

THE F. T. PEITCH COMPANY V. THE HATTIESBURG TRUST & BANKING COMPANY.

Decided, June 17, 1912.

Assignment of Bill of Lading—Consignor Retaining Control of Shipment—Off-Set by Consignee of Claim Against Consignor, When Not Allowed.

Where an invoice and bill of lading made out in the name of the consignee for goods sold the consignee are assigned by the consignor to a bank for an advance of 80 per cent. of the face value of the invoice, in an action thereon by the bank against the consignee, the latter can not off-set a claim against the consignor of which the bank had no notice, the course of dealing between the parties showing that the consignor reserved the right to control the goods shipped.

Hauxhurst & Saeger, for plaintiff in error.
Pattison & Austin, contra.

NIMAN, J.; MARVIN, J., and METCALFE, J. (sitting in place of Winch, J.), concurs.

The plaintiff in error was defendant, and the defendant in error was plaintiff in the court of common pleas. A jury was waived in the court below and the cause tried to the court. Judgment was rendered against the defendants there.

This proceeding in error is prosecuted to secure a reversal of said judgment.

On the 14th day of June, 1909, the F. T. Peitch Company placed with the Forest Lumber Company an order for lumber which was duly accepted and the lumber ordered was delivered to the carrier at Columbia, Miss., on July 15, 1909, by the Forest Lumber Company, through the agency of the Marion Lumber Company, which acted for the Forest Lumber Company. The lumber was consigned to the F. T. Peitch Company, at Cleve-

1914.]

Cuyahoga County.

land, Ohio. After the lumber was delivered to the carrier, the Forest Lumber Company assigned the invoice therefor and the bill of lading to the Hattiesburg Trust & Banking Company and then received therefor a sum of money equal to eighty per cent. (80%) of the face value of said invoice.

On the 19th day of July, 1909, the Hattiesburg Trust & Banking Company mailed the invoice, with an assignment written thereon by the Forest Lumber Company, together with the bill of lading, to the F. T. Peitch Company, requesting a remittance therefor. The invoice and bill of lading were received by the F. T. Peitch Company before the lumber reached said company. The F. T. Peitch Company refused to remit for the amount of said invoice to the Hattiesburg Trust & Banking Company for the reason that it claimed to have a set off against the Forest Lumber Company on account of the failure of said company to deliver a certain shipment of lumber under a former order accepted by it, whereby the F. T. Peitch Company was compelled to go into the open market and purchase lumber at a figure claimed to be \$239.27 in excess of that which the Forest Lumber Company had agreed to furnish the lumber.

After the refusal of the F. T. Peitch Company to pay the invoice, the Hattiesburg Trust & Banking Company brought suit against it to recover thereon, and said the F. T. Peitch Company thereupon, in its amended answer, set up the damage it claimed to have suffered on account of the failure of the Forest Lumber Company to fill the said former order and prayed that the amount of said damage be set off against the plaintiff's demand. This set-off was refused by the trial court and judgment rendered in favor of the plaintiff for the amount representing the advance made by it on the assignment of said invoice and bill of lading together with interest thereon.

At the time the banking company took an assignment of said invoice and bill of lading and advanced eighty per cent. of the face value of the invoice, it had no knowledge of any set-off in favor of the F. T. Peitch Company against the Forest Lumber Company.

We are therefore called upon to decide what rights the Hattiesburg Trust & Banking Company acquired in the assignment

of the invoice and the transfer of the bill of lading to it and the advancement thereon of eighty per cent. of the amount called for in the invoice, without notice on its part of any set-off in favor of the consignee of the lumber against the Forest Lumber Company.

It is claimed on behalf of plaintiff in error that the title to the lumber passed to it upon its delivery to the carrier by the Marion Lumber Company, and that the Hattiesburg Trust & Banking Company became a mere assignee of an account which is subject to the equity which the plaintiff in error had against the Forest Lumber Company on account of the set-off mentioned.

It is contended by the defendant in error that the bill of lading was the symbol of the property described in it and by the transfer of such bill of lading to the banking company, it in effect acquired a special ownership of the property as security for the advancement made by it.

We consider the case of *Emery's Sons v. Irving National Bank*. 25 O. S., 360, decisive of the question under consideration. In that case it was held:

"1. By the rules of commercial law, a bill of lading is regarded as the symbol of the property therein described; and in case the shipper reserves to himself the *jus disponendi*, he can transfer the title, at any time before the property is delivered by the carrier to the consignee, as effectually by the delivery of the bill of lading as by the delivery of the property itself.

"2. If the consignment be made by a vendor to a vendee, the question whether the consignor reserved the *jus disponendi* is one of intention, to be gathered from all the facts and circumstances of the transaction.

"3. If the right to control the property be reserved by the shipper, the carrier must be regarded as his agent; if not, then as the agent of the consignee.

"4. On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive.

"5. Nor is the fact, that the consignee had contracted with the carrier for special rates of freight, conclusive that the goods were delivered by the consignor to such carrier as the agent of the consignee.

"6. Where the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier, and intending

to reserve the right of control over them, at the same time draws upon the purchaser for the price, and delivers the bill of exchange, with the bill of lading attached, to an indorsee, for a valuable consideration, the consignee upon receipt of the goods, takes them subject to the right of the holder of the bill of lading to demand payment of the bill of exchange, and can not retain the price of the goods on account of a debt due to him from the consignor."

In the opinion, on page 366, it is said:

"By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control the property, is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned, by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were, in fact, delivered. If such transfer of the bill of lading be made after the property has passed in to the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have acquired by reason of his possession. But if the bill of lading be transferred by way of sale or pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him."

We think the course of dealing between the parties here in previous transactions show that the right to control the lumber shipped was reserved by the Forest Lumber Company even though the bill of lading was made out in the name of the F. T. Peitch Company.

On two previous occasions, the Forest Lumber Company had shipped lumber to the F. T. Peitch Company and had assigned the invoice and bill of lading therefor to the Hattiesburg Trust & Banking Company. These invoices and bills of lading were mailed by the Hattiesburg Trust & Banking Company to the F. T. Peitch Company for collection and remittances were made.

Those transactions were sufficient to justify the trial court in reaching the conclusion that the right of control over the lumber shipped was reserved to the Forest Lumber Company. The

transfer of the bill of lading, together with the assignment of the invoice, was made to the banking company before the lumber shipped had passed into the actual possession of the consignee and the consignee had notice of this fact before it received the lumber.

We think the necessary conclusion from these facts, applying the principles laid down in the case referred to, is that the F. T. Peitch Company took the lumber when it arrived subject to the right which the Hattiesburg Trust & Banking Company acquired by the symbolic delivery made through the transfer of the bill of lading.

The trial court, therefore, committed no error in refusing to allow the defendant's set-off, and the judgment is affirmed.

**SUFFICIENCY OF CHARGES UPON WHICH POLICE OFFICER
WAS DISMISSED.**

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL CHARLES SAVAGE, v. THE CITY OF CLEVELAND AND F. G. HOGEN, AS DIRECTOR.

Decided, June 17, 1912.

Police Officer—Trial by Civil Service Commission—Review Thereof.

If charges upon which a member of the police force of a city was tried by the director of public safety and the civil service commission and discharged from the force, are indefinite or trivial, or not such as are recognized by law or the rules made by the police department in pursuance of the law as causes for which an officer may be suspended, the judgment of suspension is void; but if the charges, or any of them, are of the kind and character which the law recognizes as sufficient to authorize the discharge or suspension of the officer from the police department, then the court will not inquire into the question whether the charges were sustained by the evidence or not, unless fraud is alleged.

F. F. Gentsch and M. B. Excell, for plaintiff.

E. K. Wilcox and John A. Stockwell, contra.

1914.]

Cuyahoga County.

METCALFE, J. (sitting in place of Winch, J.) ; MARVIN, J., and NIMAN, J., concur.

This action comes into this court by appeal from the court of common pleas.

The plaintiff in his petition claims that he was a member of the police force of the city of Cleveland, and that he was wrongfully discharged therefrom by the action of the defendant, the director of public safety, and of the civil service commission, and he seeks reinstatement upon the ground that the charges upon which he was tried and the order of suspension made were insufficient in law to sustain the judgment of suspension.

No evidence was introduced in this case, but the case was submitted to us upon the pleadings, and the only question that we have for determination is whether or not the charges which the plaintiff sets forth in his petition, and upon which he was tried before the director of public safety, and upon appeal from his decision, before the civil service commission, are sufficient in law to sustain the action of the commission.

The plaintiff claims that on the 28th day of April, 1911, he was suspended by the chief of police, and that thereupon the director of public safety caused certain charges to be filed against him, upon which he was tried. Upon the trial on appeal before the civil service commission, he was acquitted on the third, fourth and fifth of those charges and found guilty upon the others.

We think the same rule would apply in this case that would apply in a civil action, that is to say, that the charges upon which the plaintiff was tried must be of such a character as would sustain the judgment. If they were so indefinite or trivial, or were not such as were recognized by the law or by the rules made by the police department in pursuance of the law, as causes for which an officer might be suspended, then the judgment of suspension upon those charges would be void; but if the charges, or any of them, are of the kind and character which the law recognizes as sufficient to authorize the discharge or suspension of the officer from the police department, then this court can not inquire into the question whether those charges were sustained by the evidence or not unless fraud is found. The only question for us to determine is, were the charges sufficient.

The first charge reads as follows:

“Violation of Article XX of Rule 30, conduct subversive to good order and discipline of the department.”

This charge does not inform the defendant of any specific act that he is charged with, and we think it is entirely insufficient.

Charge 2 is as follows:

“Violation of Rule 43, by being a member of the Forum Club, a club organized for the purpose of giving social entertainments among the members of the police department.”

In the answer filed in this case we have a copy of Rule 43 and in it we find this provision:

“No member of the department shall * * * be connected with any club or other association or organization whose objects or purposes may have reference to the nomination or election of any candidate for office, or for the purpose of giving any social entertainments whatsoever amongst the members of the police department.”

The charge in question charges the plaintiff with having become a member of the Forum Club, a club organized for giving social entertainments among the members of the police department. This is the only specification that it contains but so far as that specification is concerned, it corresponds with the provisions of the rule in question, so that the defendant would have full notice from that charge that it was plain that he was a member of such club in violation of the rule. Therefore we think that charge 2 is sufficient.

The sixth charge reads as follows:

“Conspiracy against the good order and discipline of the police department by conspiring with others to bring about the formation of a club known as the Forum Club, contrary to the rules and regulations of the police department.”

This part of the charge we think is definite and certain enough to notify the plaintiff that he was charged with the violation of a rule of the department, and to definitely notify him what he would be expected to meet.

The remainder of the charge is entirely too indefinite and we quite agree with the judge rendering the opinion in the court below upon the demurrer to this petition, that it seems to have been framed rather with the purpose of concealing information than in giving it. We think also that the other charges are entirely too indefinite and do not accuse the plaintiff with any offense with sufficient particularity to notify him with what he was charged. But finding as we do that the second and sixth charges are sufficient, we think the judgment should be for the defendant dismissing the petition in this case.

It is urged on behalf of the plaintiff that the rule 43, so far as it prohibited members of the department from attending any club for the purpose of giving social entertainments amongst the members of the police department, is arbitrary and beyond the powers of the department to enact.

Power, however, is given to the department to enact such rules for the government of the officers as may seem necessary to the chief of police and the director of public safety, and we can not see that the promulgation of such a rule is beyond the power of the department; with its wisdom we have nothing to do.

It is also urged here that the defendant, upon his trial before the civil service commission, was denied the privileges of a separate trial. Admitting that this is true, the civil service commission seems to have been made, under the law, a court of final jurisdiction in the determination of charges against members of the police department involving their conduct and which may result in their dismissal. This court can not act as a court of review of the action of that court. If it abused its discretion or its powers, we do not see that we have any power to remedy that in an action of mandamus. All that we have the power to determine is whether the charges preferred were of such a character that they would sustain the action of that tribunal.

**PROPER TESTS AS TO REASONABLENESS OF A RATE TO
BE CHARGED FOR NATURAL GAS.**

Court of Appeals for Licking County.

THE CITY OF NEWARK, BY FRANK A. BOLTON, SOLICITOR, v. THE
NEWARK NATURAL GAS & FUEL COMPANY.

Decided, May Term, 1914.

Public Utilities—Control of Rate for Natural Gas—Elements to be Considered in Fixing Rate—What is Contemplated by the Statute Giving Municipal Councils Power to Regulate—Court Will Not Declare a Rate Confiscatory, Unless.

1. The power given to municipalities by the Ohio statute to regulate the price of natural gas contemplates an impartial and thorough investigation into all the facts for the purpose of doing justice to both the corporation and the public by establishing reasonable rates on the one hand and on the other compensation which will be just to the company.
2. The elements to be considered in fixing the rate for natural gas are the amount of net profit which may be earned under a fixed rate, and whether the rate as so fixed will yield a fair return on the investment, depreciation in the value of the plant and the risk attendant on the enterprise considered.
3. The fixing of the rate of twenty cents per thousand for natural gas for the city of Newark can not be regarded as confiscatory, notwithstanding some depletion in the supply from the wells, when it appears that the supply is still four times the consumption in that field, and the company for some time paid dividends of ten per cent. under a rate of only eighteen cents, and for several years has paid dividends under a twenty cent rate, and other localities in the same field are being furnished gas at the eighteen cent rate at the present time.
4. Moreover, rate can not be declared confiscatory unless clearly shown to be so by actual experience, and particularly will a court refuse so to declare where a mandatory injunction to enforce the provisions of the ordinance fixing the rate complained of has been in force for three years and no showing is made by the company of the result of its operations during that time.

Frank A. Bolton, Roderic Jones, Kibler & Kibler and Ralph Norpel, City Solicitor, for plaintiff.

1914.]

Licking County.

S. M. Douglas, Eugene Mackey and Fitzgibbon & Montgomery,
contra.

SHIELDS, J.; POWELL, J., concurs; VOORHEES, J., dissents.

On March 6th, 1911, the city council of the city of Newark, Ohio, duly passed a city ordinance fixing the maximum price of natural gas to be charged by the Newark Natural Gas & Fuel Company, its successors or assigns, for the period of five years next ensuing, at 20c for each thousand cubic feet of gas used or consumed by all persons, firms or corporations using or consuming the same, with a discount of 10% allowed if payment was made on or before the tenth day of the succeeding month. Declining to accept the provisions of the ordinance, the defendant company, which for years had been and then was supplying said city and its citizens with gas under an ordinance of said city passed February 21, 1898, immediately caused notice to be given to its consumers of gas by publication that on and after the April, 1911, reading of meters the price to be charged for gas would be 25c for each thousand cubic feet, subject to a discount of 10% if paid on or before the tenth of each succeeding month, and that unless said price was so paid the further supply of gas to said city and its citizens would be discontinued. Soon after said publication was made a petition was filed by the city of Newark, by Frank A. Bolton, its solicitor, in the Court of Common Pleas of Licking County, Ohio, to enforce by mandatory injunction the provisions of said city ordinance passed March 6th, 1911.

Stating it more fully and at length, said petition recites:

That the said Frank A. Bolton is the duly elected, qualified and acting solicitor of the city of Newark, Ohio, a municipal corporation, and that said action is brought by direction of its city council. That the defendant, the Newark Natural Gas & Fuel Company, is a corporation and is furnishing natural gas for fuel and light to said city and its inhabitants by virtue of a franchise granted by the said city council by ordinance passed February 21, 1898, by the terms of which there was granted to the defendant company the right and privilege of laying pipes in and through the streets and alleys and public grounds of said city for the purpose of supplying and conveying natural gas

or fuel gas to the inhabitants of said city for a period of 25 years. That for the period of 10 years from the passage of said ordinance, the defendant company was entitled to charge consumers of gas, who are inhabitants of said city, for gas furnished at the rate of 25c for one thousand cubic feet. That within ninety days after the passing and taking effect of said ordinance the acceptance thereof by said defendant was required to be filed with the said city council. That said ordinance was duly published as required by law. That within ninety days from the passing and taking effect of said ordinance, to-wit, March 21, 1898, the defendant company accepted the same in writing. That a copy of said ordinance and the acceptance thereof by the defendant company is attached to said petition. That from the date of the passage of said ordinance franchise up to the 6th day of March, 1911, said city council passed no further ordinance regulating the price to be charged by the defendant company to said city and its inhabitants for fuel and light, or either. That ever since the passage and acceptance of said ordinance the defendant company has been continuously, and now is supplying gas to said city and its inhabitants by virtue of the rights and privileges granted by said ordinance.

That on the said 6th day of March, 1911, said city council duly passed an ordinance regulating and fixing the maximum price the defendant company may charge consumers thereof, whether the city itself or its inhabitants, under said franchise for the period of five years at the rate of 20c per thousand cubic feet of natural gas for the fuel and light, meter measurement, with 10% discount on all bills paid before the 10th of each succeeding month. That said last named ordinance was on the 9th day of March, 1911, duly signed, approved by the mayor of said city, and was published as required by law, a copy of which ordinance is attached to said petition. That said last named ordinance is now in full force and that the price as therein fixed by said city council is the same price that the defendant company has been and is now charging said city and its inhabitants who have been and now are consumers of gas in said city, and ever since the defendant began furnishing gas under the ordinance granting said franchise. That the defendant company had due knowledge and notice of said ordinance passed March 6th, 1911.

That the defendant company is notifying and has notified said city and the inhabitants thereof that on and after the April, 1911, reading of meters the price charged for gas would be 25c for one thousand cubic feet, subject to a discount of 10% if paid on or before the tenth day of the following month, and it

1914.]

Licking County.

threatened that unless said price is paid by said city and its inhabitants on or before May 10th, 1911, the defendant company would stop the supply of gas and refuse to furnish gas for fuel and light to said city or any of the inhabitants who refused to pay said price so fixed by the defendant company. That the said defendant company insists upon its right to make the price for all gas furnished to said city and its inhabitants, on and after April 1, 1911, the sum of 25c per thousand cubic feet, subject to said discount of 10%, and no less, and unless restrained by the court, all consumers of gas furnished by the defendant company would be required to pay 25c per thousand cubic feet, subject to said discount on and after May 1st, 1911, contrary to the provisions of said ordinance of March 6th, 1911.

That for the purpose of avoiding a multiplicity of suits for the defendant company's threatened refusal to comply with the provisions of said ordinance of March 6th, 1911, said solicitor brings this suit.

The plaintiff further says that said city and its inhabitants are each and all of them without remedy at law and can get no relief from the processes of a court of equity, and they have no adequate remedy at law.

Wherefore, the plaintiff prays that on the final hearing of this cause the defendant company may be perpetually enjoined from charging, collecting, or in any manner attempting to collect from said city, or any of its inhabitants any other, greater or further sum for gas by it delivered for heat and light than the maximum sum or rate fixed by said ordinance passed March 6th, 1911, and that the defendant company be enjoined to specifically perform said ordinance and franchise, and that pending the final hearing of said case a temporary injunction issue to a like effect, restraining the defendant company in like manner and for all other and further relief to which said city or any of its inhabitants may be entitled in equity.

Upon the foregoing petition being filed, a temporary injunction was allowed to issue as prayed for in said petition, except as to the specific performance of said ordinance, by Chas. W. Seward, Judge of the court of common pleas of said county.

In its amended answer to said petition the defendant company sets up four separate defenses, and for its first defense says:

It denies that it threatens or has threatened that the defendant company would stop the supply of gas and refuses to furnish gas to said city or any of its inhabitants who refuse to pay the

price fixed by said defendant company; that while it admits that said ordinance of March 6th, 1911, was passed in due form by said city council, fixing the price that the defendant may charge consumers, it avers that said ordinance is unreasonable, and that the rate fixed denies to the defendant any adequate profit for the five years next ensuing and operates as a fraud upon the property rights of the defendant, and is therefore unreasonable and void, and it denies all the other averments in said petition not expressly admitted in said ground of defense set up in said amended answer.

For a second defense the defendant says that said ordinance of March 6th, 1911, is contrary to and in violation of Section 1 of Article I of the Bill of Rights of the Constitution of the state of Ohio and is therefore null and void and of no effect for the reason that said ordinance is violative and a denial of the due protection and possession of the property of said defendant without its consent.

For a third defense the defendant says that said ordinance of March 6th, 1911, is contrary to and in violation of Section 19 of Article I of the Bill of Rights of the Constitution of the state of Ohio, and is therefore null and void and of no effect, for the reason that it is the taking of private property without due process of law in that said ordinance attempts to compel the defendant to furnish gas at a price without just compensation or profit and without any equivalent or just compensation in money and against and without the consent of the defendant.

For a fourth defense the defendant says that said ordinance is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and is therefore null and void and of no effect, for that it is a denial to this defendant of the equal protection of the laws and without due process of law in this, that it tends and is designed to compel the defendant company to furnish gas for a period and at a price without adequate return, compensation or profit and without the consent of the defendant.

The defendant prays that the temporary restraining order granted herein may be dissolved; that the prayer of the petition be denied and that said ordinance of March 6th, 1911, be declared unreasonable, null and void, and for all proper relief.

After a demurrer was overruled to the second and third defenses of the defendant company's amended answer, a reply was filed by the plaintiff, and replying to the first defense therein it denies that said ordinance of March 6th, 1911, is unrea-

1914.]

Licking County.

sonable, and it denies that the rate fixed by said ordinance denies to the defendant company any adequate profit for the five years next ensuing and operates as a fraud upon the property rights of the defendant and is therefore unreasonable and void.

And for a reply to the second, third and fourth defenses of said defendant's amended answer the plaintiff denies each and all of the allegations therein contained.

The case comes into this court by appeal from the judgment of the court of common pleas of said county and was tried upon the evidence introduced in support of the issues raised by the pleadings filed in the case.

While there are several defenses pleaded in the amended answer of the defendant company, when taken together, they substantially raise the same question and make the same defense, namely, that the ordinance of March 6th, 1911, is constitutionally invalid, both under the Constitution of the United States and under the Constitution of the state of Ohio, because said ordinance fixes a maximum rate to be charged by the defendant company for the supply of natural gas to the city of Newark and its citizens for the period of five years from the date of its passage and taking effect that is both unreasonable and confiscatory in its effect, and that said ordinance is therefore null and void.

The power given by statute to the council of a municipality to regulate the price of natural gas is to be found in Section 3982 of the General Code, which provides that:

"The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light and coke companies or companies for supplying water for public or private consumption are established, or into which their wires, mains or pipes are constructed may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or heating purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water furnished to such corporation or individuals, than the price specified by ordinance of council," etc.

It will thus be seen that the term "regulate" is employed in the foregoing statute. Evidently the statute contemplates that the power thus given in fixing rates shall not be exercised short of an impartial and thorough investigation into all the facts with the ultimate object of doing justice both to the public service corporation and to the public. It does not contemplate an arbitrary fixing of rates irrespective of the rights of the corporation or the public, but reasonable rates and just compensation, and to do otherwise would be violative of the spirit of the statute and of public duty. What was actually done in the premises by the city council is not now before this court and the presumption is, in the absence of proof to the contrary, that it acted with due regard to the rights of both the corporation and the public. And that it was clothed with power to regulate the price of gas to be furnished by the defendant company is not open to question.

Said ordinance having been passed by the council, signed and approved by the mayor and having become operative after publication, what then? The defendant company not only refused to comply with its terms, but notified its consumers of gas that on and after the April, 1911, reading of meters that the price to be charged for gas would be 25c for one thousand cubic feet, subject to a discount of 10% if paid on or before the 10th day of the succeeding month. It is fair to assume that this action was taken for the reasons set forth in the defendant company's amended answer.

As has already been pointed out, the city council has the power to regulate by ordinance the price of gas in municipalities, but this power does not reside in the court, whose province and duty it is to judicially declare whether or not the rate fixed in said ordinance is reasonable or otherwise. With this duty discharged its power is exhausted. What constitutes reasonable rates for this purpose is a subject that has given the courts no little concern. The various conditions that may be present in one case may be absent in another. Hence there is no uniform rule laid down to be followed by courts, for no particular rates can be established for all cases. Quoting from the opinion

1914.]

Licking County.

of Justice Peckham in the case of *Wilcox et al v. Consolidated Gas Co.*, 212 U. S., 19-48:

"There is no particular rate of compensation which should in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk the less right to any unusual returns upon the investment. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference than can be obtained from an investment in government bonds or other perfectly safe security."

It will thus be seen that locality, risk and other considerations may enter into the reasonableness of the rates fixed. And in fixing such rates the rights of both the corporation and the public are to be equally considered. The ends of justice would not be met by disregarding the interests of either. On the one hand, the company is entitled to a fair return upon the reasonable value of that which it employs for the public convenience, and on the other hand what the public is entitled to demand is that no more be exacted from it than what such company furnishes is reasonably worth.

In *Covington & Lexington Turn Pike Road Company v. Sandford*, 164 U. S., 578, 597, 598, Justice Harlan, speaking for the court, says:

"In short, each case must depend upon its special facts, and when a court, without assuming itself to prescribe rates is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests, both of the public and of the owner

of the property, together with all other circumstances that are to be considered, by determining whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law.

"The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the Legislature when exerting its general powers is that it receive what, under all the circumstances is such compensation for the use of its property as will be just, both to it and to the public."

Again, in *San Diego Land & Town Company v. National City*, 174 U. S., 739:

"What the company is entitled to ask is a fair return upon the value of that which it employed for the public convenience."

In *Wilcox et al v. Consolidated Gas Company, supra*, it is held that:

"The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and to the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public."

Numerous other authorities might be cited sustaining this same view, but from the authorities cited we think it is apparent that the law enjoins upon a legislative body, such as a city council, in fixing rates for any public service corporation that they be so fixed as to be just both to the corporation and to the public.

Is the rate fixed by the ordinance in question reasonable or otherwise? Was it fixed with reference to the rights of this corporation and of the public? If it was and it is reasonable, the relief asked for by the defendant company should not be granted, but if it was not and it is unreasonable and it denies to the defendant company equal protection of the laws in attempting to compel it to furnish gas for a period and at a price without adequate return, without its consent, then such relief

1914.]

Licking County.

under favor of the Fourteenth Amendment to the Constitution of the United States should not be denied.

We are therefore confronted with the inquiry, how is this court to determine whether or not the rate is reasonable or otherwise? What is the test to be applied? This question has been before the federal courts at various times and the rule there adopted in determining the reasonableness of rates is:

First, to ascertain the value of the plant of the corporation.

Second, to determine, if possible, the total amount of the net profits which it can earn under the rate fixed.

Third, to determine whether the amount of said profits is sufficient to provide a fair return on the reasonable value of the plant.

A vast amount of testimony was introduced under these different heads, especially relating to the cost of the defendant company's plant, including promotion and organization cost, construction and engineering work, the risks incident to the production and distribution of gas, the necessity of maintaining a large reserved area of gas-developed territory to meet exigencies liable to arise in the various sources of supply, the market price of gas delivered at Newark, etc. Indeed the variety of subjects is so great and the testimony relating thereto so voluminous, a large part of which consists of expert testimony, it would seem that their intelligent solution would be aided by the services of a well-trained and experienced gas expert. But in its analysis the case will be found to present legal questions, the solution of which may be helpful in enabling the court to reach a better understanding of the facts in the case.

Let us take up and consider the first proposition, namely, the value of the plant of the defendant company and the elements that should be considered in arriving at such value and when the valuation should be determined.

In *McQuillan on Municipal Corporations*, 1750, the rule is stated as follows:

"The only practical test for determining the amount on which the public service company is entitled to a fair return is the present value of the property of the company at the time of the inquiry."

In *Dillon on Municipal Corporations*, 1331, it is laid down that:

“When the inquiry is directed to the reasonableness of the compensation, founded upon a fair return to the corporation upon the value of the property used for the public, the value of such property is the basis of that inquiry.”

Under the rule laid down by the foregoing authorities, supported by numerous adjudicated cases, the rule appears to be well established that the value of the property at the time of the fixing of the rates is the basis of valuation to be employed in determining the reasonableness of such rates.

The testimony shows that the defendant company was incorporated in 1889 with a capital stock of \$81,600 and that no additional capital has ever been put into it for any purpose, except such as has been taken out of the earnings of the company.

The history of the company consists of three periods, the Everett management, extending from 1889 to 1898, the Logan management, from 1898 to 1902, and the Union Gas Corporation, from 1902 to the present time.

The value of this property rests upon evidence furnished largely by the defendant company, supplemented by evidence covering the result of an examination made of its books by an expert accountant. As tending to show the value of the defendant company's property, R. S. Lord, a witness for said company, testified that he was employed by it in March, 1912, to examine said property and then placed a value on it at \$309,000. In estimating such value the original cost of much of the material employed in the construction of said company's plant seems to have been based upon an examination of the books of the company and information furnished him. In making such estimate he testified that 50% deduction from the original cost of the line between Newark and Thurston, if the same is not in use, should be made, namely, \$24,000; that no allowance for financing expenses, or organization cost, or interest charges, etc., during the construction of said plant was included, and that no allowance was made for general depreciation of the plant covering a period of some ten years. The book value of the plant

1914.]

Licking County.

December 31, 1911, was shown to be \$302,889.02, exclusive of allowance made for depreciation and franchise value. In June, 1902, the book value was shown to be \$183,187.96, which amount was made up of various items as shown on page 541 of the record. In this estimate was included also an item of \$60,000 for "rights of way." A. J. Drolet, general auditor of the Union National Gas Corporation of Pittsburgh, a witness for the defendant company, testified that although the books of said company showed that by an inventory then taken the franchise value was then entered on said books at \$3,500, said sum was increased to \$60,000 in six months after that time. The record on pages 542, 543 and 544 shows that said witness testified upon this subject as follows:

"Q. Now, under the head of rights of way, what do you mean by that? A. That is an account that we have. It is a franchise account. It is supposed to cover intangible values. We merely put it down. That is all; we had so many thousand consumers, and an investment of so much, and knowing about how much it ought to be per consumer, we noticed that there was a certain amount missing from the investment. We could not ascertain just where it was. It is a matter that has been ascertained by the accounting department, we are not authorities on that.

"Q. As a matter of fact, it is simply a value that is put upon the franchise. A. Yes, sir, covering all intangible value.

"Q. You had an inventory taken in 1902, in June? A. Yes, sir, I think so.

"Q. And that right of way was placed at \$3,500? A. Yes, sir.

"Q. And was increased in December of the same year to \$60,000? A. Yes, sir. Because we did not believe \$3,500 covered it.

"Q. Well, it did not cost anything? A. It is a question. I don't know. We knew that the plant was worth more than \$123,000.

"Q. Your schedule shows the actual earnings and actual expenses of your company? A. Yes, sir. This was merely an inventory. I haven't that list of pipe and meters; that is all that I received in the Pittsburgh office—this list of material. In view of the fact that there was no absolute physical appraisal taken of the plant, nothing else was left for us but to extend the figures at what we thought was right.

"Q. And you voluntarily increased the investment of the company from \$122,638.00, by adding \$60,000.00? A. Yes, sir.

"Q. In six months' time? A. That is a feature which we had omitted in the opening.

"Q. That was an inventory? A. Yes, sir, of the physical property.

"Q. In June, 1902? A. Of the physical property, yes, sir.

"Q. The physical property in June, 1902, was \$122,000? A. That is what we thought it was. We put \$60,000 as being intangible.

"Q. And the \$60,000 which you added was the franchise value? A. Yes, sir. What we estimated was the franchise value.

"Q. And you have nothing on your books to show that you paid anything at all for the franchise? A. Nothing at all, no sir."

It would appear that if the foregoing illustrates the modern methods of bookkeeping in capitalizing corporation values, investigation may be helpful in disarming criticism that frequently follows where trust and confidence are fortified by book figures.

Evidence was also offered of the valuation placed upon this property by the state tax commission for the years 1911 and 1912 at \$572,450 and \$435,670, respectively, while the value placed upon practically the same property by the company itself in the sworn statement of W. J. Broder, its secretary, for the years 1908, 1909 and 1910 (as appears on page 398 of the record) was \$41,996, \$47,114 and \$47,706, respectively. By the authorities this evidence is held to be immaterial for valuation purposes except as it tends to show the value placed upon the property by the company.

It is difficult to arrive at anything like a satisfactory conclusion as to the value of the company's property in March, 1911, when it is considered nothing else was charged off for depreciation and that no definite showing appears of the actual operating expenses incurred or an itemized account of the betterments made from year to year. It is well settled that a deduction should be allowed for depreciation from age and use of the plant when determining the present value of tangible prop-

1914.]

Licking County.

erty for the purpose of testing the reasonableness of rates fixed by a municipal ordinance. *Knoxville v. Knoxville Water Co.*, 212 U. S., 1.

As bearing upon a fair per cent. to be deducted for depreciation, Mr. Drolet testified that 5% was a reasonable per cent. And it is also well settled that a further deduction for franchise value should be made. *Lincoln Gas Co. v. City of Lincoln*, 182 Fed. Rep., 926, 928.

As already indicated no such reliable and definite information was presented to the court to enable it to reach a conclusion wholly satisfactory to itself of the value of the defendant company's property in March, 1911, but in the light of the evidence introduced upon the subject, as we analyze it, and applying the rules of law already stated, the value of said property at that time appears to be \$89,460.78. This amount may not be mathematically correct, owing to the incomplete and unintelligible condition of the company's books in respect to the disbursements made and profits earned by it during the time mentioned as the same appeared in the evidence and in this connection the evidence of the expert witness, J. Hope Sutor, who examined said books is not overlooked, but it is a result reached and verified by an examination involving a careful analysis of such evidence.

The second proposition, as stated, is to ascertain, if possible, the total amount of the net profits the defendant company can earn under the rate fixed.

This is a matter of no little importance to the defendant company, because whatever its earnings may have been prior to the passage and taking effect of the ordinance of March 6th, 1911, conditions may have intervened increasing or decreasing the facilities and cost for supplying gas by the said company.

The claim made that natural gas is distinguishable from other public utilities in that its quantity or quality is beyond human control, and that there is ever present an element of risk attending its production and distribution, is not questioned, nor is the correctness of the claim challenged that the quantity of natural gas may be affected by decreased rock pressure as well as by other varying conditions, all of which no doubt would

tend to increase the cost of production. These elements of uncertainty appear to be peculiar to the business, including also the risk attending the development of gas territory, and other risks, too, necessarily connected with the production and transmission of gas; but these risks are such as are assumed by the investor, a fact, however, which should not and can not weigh in considering the question under discussion here. In this enumeration of risks, it will be observed that the evidence given upon the subject refers to no one particular plant, but to the numerous plants of the Logan Company, whose property interests are admittedly large.

Among other things, it is urged by the defendant company that the wells in the Knox-Licking field (designated herein as the local field) have become so depleted of late, thereby increasing the cost of production, that neither the Logan Company, nor any other company, can furnish gas to the defendant company or the city of Newark and its citizens at the rate fixed by said ordinance with anything like a reasonable net profit on the value of its plant. If this claim is borne out by the facts, then the equitable relief asked by the defendant company should be granted.

But what are the facts in this respect as disclosed by the evidence? Undoubtedly the wells in the local field have become more or less depleted owing to the causes described, but the evidence shows that said wells at the beginning of this litigation yielded more than four times the quantity of gas consumed by the city of Newark and its citizens. True it is shown that only 60 per cent. of the gas delivered at the city of Newark was of the product of said wells, and the balance is from the West Virginia field. If this condition prevails, there must be some reason for it, but no reason appears to be given, nor does the record show the cost to said company of producing gas in the local field, although there was no little testimony introduced by the plaintiff bearing upon the cost of producing natural gas in territory adjacent to the local field as evidenced by the contracts for its sale and delivery to various cities in this state. Omitting figures, it is sufficient to say that such testimony appears to warrant the

1914.]

Licking County.

statement that the cost of producing gas and its sale at the prices therein named about the time of the passage of said ordinance do not indicate that the rate fixed therein is confiscatory in its effect.

Considerable testimony was offered upon the trial showing the price of gas delivered to various cities in this state as tending to show the general market price thereof, delivered at the city of Newark. In the absence of any testimony tending to show the cost of producing and transporting gas to the city of Newark for distribution, such testimony would be entitled to no little weight, but what is the effect of such testimony as against proof of the cost of producing gas in the immediate vicinity of the local field, supplemented by proof that gas was being furnished at that time by said company at the 18 cent net rate? Situated as the city of Newark is, substantially contiguous to the local field, does not this fact when considered in connection with the admitted fact that the citizens of said city were supplied with gas by the same company for years prior to and up to the time of the passage of said ordinance at a rate not in excess of the rate fixed by said ordinance, minimize if not nullify the legal effect of any showing of the market value of gas at said city at said time? Assuredly different conditions may exist in other cities where possibly the price of gas may be governed by the volume of the supply, and other considerations may also enter into the price there charged for gas, but as we view it, the real question made here is not what the prevailing price of gas at that time was elsewhere, but what was it reasonably worth when furnished to the citizens of Newark, in view of all the conditions here shown, and is the rate fixed by said ordinance such as to yield a fair return on the reasonable value of the company's property, above all legitimate and proper charges?

As we read the record, the earnings of the defendant company during the year 1911 were such as to pay over 10% net profit, and that in 1910 they yielded a much larger net profit. True the record covering these two years, standing alone, and in the absence of other evidence, might not be a safe criterion upon which to base a judgment of the net earnings of the com-

pany before that time. but the evidence shows that the total net earnings of this plant were very profitable from the time it was first organized, yielding to the management from 1902 to December 31, 1911, an average annual net profit of over 8%, *during all of which said time said company charged the citizens of the city of Newark for gas the 18 cent net rate.* We do not feel called upon to pursue this inquiry further, feeling that the foregoing facts furnish their own comment, and while it is impossible to say with any degree of certainty what the net earnings of the company may be during the future five years' period, under said ordinance, it is reasonably safe to say that in view of the net earnings of the company during the period from 1902 to and including at least a portion of 1911, they will be such as to avoid the charge of being confiscatory is their effect.

We now reach the third and final proposition. Will the amount of net profit be such as to yield a fair return on the value of this plant? It would seem that the conclusion reached as to the second proposition herein ought to be a sufficient answer to this inquiry, but we will notice some claims of counsel based upon said company's amended answer. Counsel for said company quote the following from the opinion of the court in the case of *New Memphis Gas Light Company v. City of Memphis*, 72 Fed. Rep., 952-955:

"The state is under an obligation to act justly, and without arbitrary discrimination between corporations of the state, just as it is between citizens of the state enjoying the equal rights. The state can not, under the guise of a regulation, bring about a destruction and a confiscation of the company's property; and the state's power to absolutely abolish the corporation must be distinguished from its powers to destroy its business and confiscate its property so long as it chooses to permit its existence and to authorize its business by a valid charter. And the question of the reasonableness of the rate to charge is an elementary question for judicial investigation, requiring due process of law for its determination. And to deprive a company of the power of charging reasonable rates for the manufacture and sale of gas is to deprive it of the business of its property, and, in effect, of the property itself, without due process of law."

1914.]

Licking County.

The foregoing embraces a concrete statement of the law. It tersely points out the constitutional guaranty afforded by the Fourteenth Amendment to the Constitution of the United States and incidently touches the vital question raised in this case wherein it is claimed that the defendant company is denied the equal protection of the laws and without due process of law, in that said ordinance seeks to compel it to furnish gas for a period and at a price without adequate return without its consent.

It is to be remembered that the defendant company operated under another ordinance of the city of Newark in furnishing it and its inhabitants with gas and was so engaged at the time of the passage of the March 6th, 1911, ordinance. Its relation to the public, therefore, then became fixed so far as being subject to public control.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79-84, Justice Brewer, delivering the opinion therein, quotes from *Munn v. Illinois*, 94 U. S., 113, as follows:

"Property does become clothed with a public interest when used in a manner to make it a public convenience and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that business and must submit to be controlled by the public for the common good to the extent of the interest thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

As already indicated, this power of control lodged in the city council, under the statute, should be exercised not arbitrarily but with an unbiased judgment and discretion, and such a rate fixed as will afford to the company a just compensation on the reasonable value of the plant at the time it was being used for the public—a rate that is just both to the company and to the public. "The idea of reasonableness is justice, and that which is unjust can not be reasonable," says Justice Brewer, and it might here be remarked that courts have not been slow to safeguard property rights when the protection afforded by the Four-

teenth Amendment to the Constitution of the United States has been denied, nor on the other hand has the strong arm of the law been withheld from the public to protect it from imposition and wrong. With this record before us showing the net earnings of the company for the period named to be unusually large on what has been found to be the reasonable value of its plant, can the reasonableness of the rate fixed by said ordinance be successfully challenged as being obnoxious to or in contravention of the provisions of the said Fourteenth Amendment? The action of the city council being admittedly within the limits of legislative authority and its action being founded upon modes of procedure adopted for the government of municipal legislative bodies, such modes are to be regarded as due process of law. Having enacted this legislation, the will of the city council, speaking through this ordinance, becomes the law—the law unto this corporation and all persons affected by it—unless it should be made to appear that the constitutional provision safeguarding property rights has been disregarded. Here it is not claimed that there is any lack of uniformity in the operation of the said ordinance, or that there is any unjust corporate classification or discrimination made, but that it is here sought to take private property for public use without just compensation, in violation of the Fourteenth Amendment which forbids any state “to deny to any person within its jurisdiction the equal protection of the laws.” That corporations are persons within the meaning of this constitutional provision is well settled, and in view of the repeated adjudications of the highest court in the land upholding this constitutional provision it has become generally recognized that “no duty rests more imperatively upon the courts than the enforcement of this constitutional provision intended to secure that equality of rights which is the foundation of free government.” Observing this injunction upon courts, what is the duty of this court in view of the record before us? Can it be said that the rate fixed by said ordinance is confiscatory in its effect, or that it will be during the future five years period, in view of its net earnings shown for the period named when the price charged by the defendant company

1914.]

Licking County.

was at the 18 cent net rate? Acting upon the well settled principle that rates will not be declared confiscatory unless clearly shown to be so, a majority of the court are of the opinion that the rate fixed by said ordinance is not unreasonable or confiscatory in its effect, and we therefore hold that neither of the several defenses of the defendant company, which has the burden of proof, is sustained by the evidence.

But there is another feature of this case which should not be overlooked, in our judgment, and that is that said ordinance has not had the test of actual experience. There was no showing made by the defendant company of the practical effect of the rate fixed by said ordinance from the date of its passage to the date of the trial in this court, a period covering three years and more. In the absence of a showing made by the defendant company, *in a case permitting it*, that such rate will not yield a fair return on the reasonable value of its property employed, should not courts hesitate to interfere with rate legislation before being advised of the practical result of such rate?

In *Dillon on Municipal Corporations*, 1327, it is laid down that:

"The judiciary ought not to annul or set aside rates established by legislative action unless they are proven or shown to be such as to make their enforcement equivalent to the taking of property for public use without such compensation as under all of the circumstances is just, both to the owner and to the public, that is, judicial interference should not occur unless the case presents clearly such a violation of the rights of property under the form of regulation as to satisfy the court that the rates prescribed will have the effect to deprive the company of reasonable compensation for its services."

In *Knoxville v. Knoxville Water Co.*, *supra*, Justice Moody says:

"The judiciary which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States."

Again, in *San Diego Land & Town Co. v. National City*, *supra*, Justice Harlan, speaking for the court, says:

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of private property for public use without such compensation as under all the circumstances is just, both to the owner and to the public; that is, judicial interference should never occur, unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use."

Again, in *Wilcox et al v. Consolidated Gas Company*, *supra*, Justice Peckham says:

"But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation as based upon the value of the property found by the court below, and the defendant depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made, if continuing business under that rate and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts."

From the foregoing it appears that the reasonable and safe rule for courts to follow is to decline to interfere by injunction with rate-making legislation before a fair test is made and shown of the practical effect of the rate fixed, to the end that courts may intelligently act upon evidence based upon the result of actual trial of such rate rather than speculation. As in the case of *Knoxville v. Knoxville Water Company*, *supra*, so in this case, if it shall hereafter be made to appear under the actual operation of said ordinance that the returns allowed by it operate as a confiscation of property, the courts are open to afford a remedy.

1914.]

Butler County.

The same decree may be entered herein as was entered in the court of common pleas. Exceptions.

Motion for new trial, if made, will be overruled. Exceptions.

Thirty days from this date will be allowed for a finding of facts and the statutory period allowed for filing a bill of exceptions.

RIGHT TO USE OF A WAY NOT ACQUIRED BY PRESCRIPTION.

Court of Appeals for Butler County.

AUGUST GUSTAFSON AND FRANCISKA GUSTAFSON V. JACOB
URSALES AND VERONICA URSALLES.

Decided, May, 1914.

Easements—Use of a Way Not Adverse Where Privilege Was Acquired by Arbitration—Failure to Close a Gate and Failure to Keep a Fence in Repair Distinguished—Meaning of the Word "Let" in the Phrase "Without Let or Hindrance."

1. The submission by the user to arbitration of his right to use a strip of land as a road leading to a public highway, is inconsistent with the claim that its use has been of a character which has ripened into a title by prescription; and where the condition imposed for its use by the arbitration has not been observed, injunction lies against its further use.
2. The phrase "without let or hindrance" is a tautological expression in which the word "let" does not mean "permission," but has the same meaning as "hindrance," and the adoption of this phrase in defining the nature of the "use" which has been enjoyed in no way assists in establishing a right by prescription.

Shank & Koehler, for plaintiffs.

W. S. Bowers and C. J. Smith, contra.

JONES, E. H., J.; SWING, J., and JONES, O. B., J., concur.

This case was heard on appeal from the court of common pleas. The plaintiffs herein asked for an injunction enjoining the defendants Jacob Ursales and Veronica Ursales from using a part of plaintiff's farm as a roadway leading from the lands of defendants to a public highway. The claim of the defendants

to the use of the roadway rests upon a long and continued use thereof by themselves and their predecessors in title, which use it is claimed by them has been open, continuous and adverse for a much longer period than twenty-one years, and has ripened into a right by prescription. This is met by the plaintiffs with the allegation that said use has been permissive only; and further, that such permission was conditioned upon the keeping up of a certain fence along said right-of-way and upon the lands of plaintiffs by the users of said roadway.

The question thus presented is a simple one, but the evidence is somewhat vague and unsatisfactory as to the real terms and conditions under which such roadway has been used for about half a century. It clearly appears, however, from the evidence, that some forty years ago a dispute arose with reference to said roadway, between Mr. Roll, the immediate predecessor in title of the defendants, and Mr. Johnson, then the owner of the servient tract. The matter was submitted to arbitration and it was decided that Roll should have the use of the roadway upon the condition that he maintain in good order the fence above referred to. This decision was ratified by the parties, but was not in writing. No other agreement or action with reference to said easement appears from the evidence, and Mr. Roll continued to use the roadway upon those terms until about seven or eight years ago when he sold the farm to the defendants and they moved thereon.

The act of Mr. Roll in submitting the matter to arbitration is inconsistent with a claim on his part to the use of the roadway such as would ripen into a title by prescription.

It appears from the testimony of Mr. Hussey that about ten years ago permission was asked and secured from the then owner of the tract of land over which the roadway passed, for Mr. Hussey to pass over and along said roadway in going to and from the lands of Mr. Roll which he had rented. There are some other facts and circumstances related by witnesses, but aside from those referred to there is nothing which throws much light upon the question involved here.

1914.]

Butler County.

After giving the case careful consideration, we have reached the conclusion that the evidence does not support the claim of a right of user by prescription. It appears that the use of the strip of ground as a roadway was looked upon and considered by the parties interested, as a permissive one. The evidence clearly shows that it was always conditioned upon the maintenance of a fence, and that this fence, at the time this action was brought in the court of common pleas, was out of repair and not such a fence as met the requirements of the agreement. The permission to use the roadway had been forfeited by the defendants in deliberately failing to maintain the fence after they had been informed that such was the condition upon which the roadway could be used.

In the case of *Holtsberry v. Bounds*, 9 C.C.(N.S.), 510, which involves a like question, the court found that the right to use the roadway was conditional upon keeping the gates closed, and that although the gates had been left open at times, the failure to close them did not work a forfeiture of the easement. We think, however, that there is a marked distinction between the failure to close a gate or gates, and the failure to keep a fence in repair. The former can be attributed, from our experience, to an occasional inadvertence, while the latter must be accounted for by deliberate and continued neglect and indifference.

The case of *Pavey v. Vance*, 56 O. S., 162, is relied upon by defendants. The propositions of law stated in the syllabus, when carefully considered in the light of the evidence in this case, strongly support the contention of plaintiffs. The first paragraph of the syllabus says:

“When one uses a way over the land of another without permission as a way incident to his own land and continues to do so with the knowledge of the owner, such use is, of itself adverse, and evidence of a claim of right. And where the owner of the servient estate claims that the use was permissive, he has the burden of showing it.”

We see that the use must be “without permission.” The facts in the case cited, as stated in the opinion, show the absence of any evidence whatever that any express permission had been

given for the use of the roadway, and in that respect it differs materially from the case at bar. It appears from the opinion in the case of *Pavey v. Vance* that the learned judge in writing his conclusion founded it upon a misconception of the meaning of the word "let" as used in the phrase "without let or hindrance." There was a finding of facts by the circuit court in which it was found that the use of the roadway had been "without let or hindrance" for a period of over twenty-one years. It is apparent from the language used at the close of the opinion, on page 174, that the word "let" was construed as synonymous with the word "permission," and that the circuit court having found that the use was without permission such finding was binding upon the reviewing court. A little investigation would have disclosed that the word "let" has no such meaning when used in the phrase "without let or hindrance." As there used, it means "obstruction," "obstacle." It is so defined in every dictionary which we have been privileged to consult. The Century Dictionary says that the phrase "without let or hindrance" is tautological. In other words, that the words "let" and "hindrance" mean the same thing.

Counsel for defendants have used this phrase with some frequency in the pleadings and brief in this case in describing the nature of the user here involved. When correctly interpreted the use of these words in defining the nature of the user can not help to establish a right by prescription, and on the theory that the phrase may have been inadvertently used, we have pointed out the manifest mistake in the definition of the word "let" adopted by the Supreme Court in the above case.

We are of the opinion that the plaintiffs have succeeded in sustaining the burden of showing that the use of this roadway was by permission only.

A perpetual injunction will be allowed; neither party will be awarded any money judgment; and the parties will be required to pay their own costs.

VERBAL WARRANTY UNDER A WRITTEN CONTRACT.

Circuit Court of Cuyahoga County.

JOHN A. WEBER v. THE NERNST LAMP COMPANY.

Decided, June 17, 1912.

Written Contract—Prior Verbal Special Warranty—Evidence of, Not Competent.

In an action on a written contract for the installation of certain lamps containing the following provision, "This contract annuls any and all agreements, quotations and understandings both written and verbal, if any, which have heretofore existed between the parties hereto, and shall * * * become a contract covering all agreements and understandings, either verbal or written existing between the purchaser and the company," evidence tending to show a verbal special warranty of the lamps made by the agent of the vendor before the signing of said contract, will not be received.

T. J. Ross, for plaintiff in error.*H. A. Couse*, contra.

METCALFE, J. (sitting in place of Winch, J.); MARVIN, J., and NIMAN, J., concur.

The defendant in error, the Nernst Lamp Company, was the plaintiff in this action in the court below.

The action was brought before a justice of the peace upon a contract to recover for the price of six lamps sold by the defendant in error to the plaintiff in error. The action was tried before a justice of the peace and appealed to the court of common pleas, where judgment was rendered in favor of the defendant in error, and error is prosecuted here to reverse that judgment.

It appears from the pleadings and the evidence in this case that on the 8th day of August, 1907, the parties entered into a written agreement by which the Nernst Lamp Company agreed to sell to John A. Weber six lamps. The petition is based upon the agreement, but a recovery is sought for the entire amount of the contract, no payments having been made thereon.

The defendant, by way of answer, sets up, first, certain representations claimed to have been made to him by a representative of the company at the time the contract was entered into, and upon the trial of the case in the court of common pleas, the defendant asked leave to file an amended answer. The court refused to grant him leave to file such amended answer, and thereupon the defendant offered to prove certain facts.

Whether there was error in the case in our judgment depends entirely upon the question whether the facts which the defendant below offered to prove upon the trial were of such a kind and character that they were admissible in evidence as a defense in the case. The contract contains several clauses; it does not contain any express warranty. The only part of it which it is necessary for us to consider at this time is the fourth clause, which reads as follows:

“This contract annuls any and all agreements, quotations and understandings, both written and verbal, if any, which have heretofore existed between the parties hereto, and shall be binding upon the company only when approved by the president or the vice-president of the company and when accepted by the purchaser; and so approved, shall become a contract covering all agreements and understandings, either verbal or written, existing between the purchaser and the company.”

The amended answer which the defendant below asked leave to file upon the trial, sets forth that the plaintiff, by fraud, procured and induced the defendant to execute and deliver the contract set forth in the petition, by representing to him, in substance, that the lamps in question had a capacity to burn from 600 to 800 hours; that the lighting capacity of six of those lamps was equal to or greater than the total number of lamps which the defendant had installed in his place of business, and that the cost of maintaining the same would be very much less than the cost of maintaining the lamps which the defendant was then using. This, in substance, covers the representations which the answer sets out and claims to have been made by the company to the defendant below.

In support of that answer, the defendant, upon the trial in the court of common pleas, made a general offer to prove certain

things. Some question is raised as to whether this offer was sufficient. We are inclined to think that it is, provided the matter offered to be proven is pertinent to the issue and should have been admitted in evidence.

The offer, in substance, is that before the contract was entered into for the purchase of the lamps, a representative of the Nernst Lamp Company stated to the defendant, Weber, that the lamps in question would burn for the period of 600 to 800 hours; that after examining the lights in the place of business of the defendant he stated that six of the Nernst lamps had a capacity of doing the work of all the small lights in the defendant's place of business, and that the current consumed by the Nernst lamps and the cost of maintaining the same was much less than the cost of maintaining the small lights then in said bar room, which he then examined, and that he would receive a greater amount of light therefrom and better service.

He then offers to prove that the lamps did not come up to the representations made by the representative of the company in lighting capacity, and that the company was notified to that effect and substituted other lamps for the first ones delivered, and that the second installment of lamps did not meet the requirements of the defendant in his place of business better than the first; and other matters of this sort.

The representations claimed to have been made were entirely the representations of a representative of the company, and we think that any statements made by a representative would be entirely covered by Clause 4 of the contract, and they could not be offered in evidence unless the statements were of such a character as to show fraud on the part of the company.

The statement made and offered to be proved would tend only to constitute a warranty; they are not sufficient to constitute fraud, and there being no warranty clause in this contract, no express warranty, we think that the defendant can not be permitted, in view of the provisions of Clause 4, which I have read, to prove an express warranty. *Bagley v. General Fire Ex. Co.*, 150 Fed. 284.

Indeed, it seems to us that none of the matters offered to be proved by counsel for the defendant below, plaintiff here, are

competent in this case, and that the entire contract of the parties having been in writing, the law will not permit proof of matters which are clearly matters of contract and outside of the written instrument itself. For that reason we think the judgment in this case should be affirmed.

PREMATURE ENTERING OF JUDGMENT.

Circuit Court of Cuyahoga County.

FRANK BRADLEY ET AL V. W. H. K. HERRON, and W. H. K. HERRON V. FRANK BRADLEY ET AL.

Decided, June 17, 1912.

Appeals—Discovery—Judgment Entered Before Overruling Motion for New Trial—Bill of Exceptions.

1. An action on a contract for a money judgment though it require a discovery of information solely in the possession of the defendant, is triable to a jury and not appealable.
2. Final judgment should not be rendered in an action until the motion for a new trial is overruled, where one is properly filed, and where judgment is entered before the overruling of the motion for a new trial, the forty days for the preparation and filing of a bill of exceptions does not begin until the overruling of the motion for a new trial.

T. H. Hogsett, M. H. Nason and William Howell, for Frank Bradley et al.

Matthews & Orgill, contra.

NIMAN, J.; MARVIN, J., and METCALFE, J. (sitting in place of Winch, J.), concur.

Frank Bradley and L. G. Bradley were plaintiffs and W. H. K. Herron was defendant, in the court of common pleas.

The defendant has appealed from the judgment of the court below, and has also prosecuted error to reverse said judgment.

The plaintiffs have filed a motion to dismiss the appeal for the reason that the cause is not appealable.

1914.]

Cuyahoga County.

The petition discloses a cause of action based upon a contract whereby the plaintiffs sold to the defendant twenty-five shares of the capital stock of the Herron-Bradley Coal Company, and were to be paid therefor an amount not to exceed \$1,250, depending upon the net profits of the corporation during the first and second years following the sale of the stock. If the corporation made no profits during this period of time, the defendant was to pay nothing for the stock.

The petition, after the title of the cause, bears the words, "petition for specific performance and equitable relief," and contains averments to the effect that the defendant has refused to take an inventory of the property of the corporation as required by the contract under which the stock was sold; that he has refused to permit an audit of the books of the corporation; that he has so carelessly kept the books that it is impossible to discover the condition of the business without the services of an expert in auditing; and that he has refused to submit to the plaintiff any statement of the business as to profits.

The relief sought against the defendant, as expressed by the prayer of the petition, is:

"That he be required to submit the books of the Herron-Bradley Coal Company, and the books of its successor, the Economy Coal & Supply Company, to such proper attorney or attorneys as these plaintiffs may designate, for examination, and for the purpose of verifying the statement of said defendant as to profits. That he be required to furnish to these plaintiffs said statement as to profits for the year ending May 23, 1908, and May 23, 1909.

"That he be required to make a complete inventory of said corporations, and that he be ordered and required to permit these plaintiffs to be present at the making thereof. That he be required to exhibit to these plaintiffs the checks, vouchers and cash account of said corporations showing the amount of money drawn by him as salary for the two years mentioned in said agreement, and that he be required to exhibit to these plaintiffs, the vouchers, papers and books showing the cash and other items advanced by him as loans to care for the obligations of said corporations and that plaintiffs have judgment for \$1,250 and interest from May 22, 1909, or for such less sum as shall be found to be the net profits of said business for said years, and for such other and further relief as may be just and proper."

In spite of the fact that the petition is called one for specific performance and equitable relief, and in spite of the prayer of the petition, conforming to the averment mentioned, it is apparent that the main relief sought by the plaintiffs is the recovery of a money judgment for breach of contract. The case is identical in principle with *Chapman v. Lee*, 45 O. S., 356. The syllabus of that case is as follows:

"1. Upon the trial of an action against several defendants, where the plaintiffs in their petition charge upon the defendants a conspiracy to cheat and defraud the plaintiffs, thereby procuring and appropriating to their own use a single sum of money which rightfully belongs to the plaintiffs, and which they are entitled to recover, and for which they seek a joint judgment against the defendants, and the answer admits the receipt of a stated sum of money, and is otherwise, in effect, a general denial, either party is entitled to demand a jury, notwithstanding the plaintiffs pray for a full discovery, and for an account of the full amount due to them, and to have an equitable lien declared and enforced.

"2. In such case the remedy of accounting in equity is not necessary to full and adequate relief to the plaintiffs.

"3. Adequate means of obtaining discovery from parties to actions at law being afforded by our statute, suits for discovery, as prosecuted in equity, before the adoption of the code, are practically obsolete in this state."

It follows that the appeal in this case must be dismissed.

Coming to the consideration of the error proceedings, we are called upon to decide whether or not the bill of exceptions was filed within the required time. The case was decided by the trial court on April 3d, 1912, and a motion for a new trial was filed on the same day. On April 4th the court rendered final judgment for the plaintiff without passing on the motion for a new trial. On April 6th the motion for a new trial was overruled. The bill of exceptions was filed on May 14th. If the time within which the bill of exceptions should have been filed is to date from April 4th, it was filed one day too late, but if the day when the motion for a new trial was actually overruled is the date from which the forty days begins to run, the bill was filed within the required time.

1914.]

Cuyahoga County.

Final judgment should not have been rendered until the motion for a new trial was overruled, and we think that the defendant had forty days from the overruling of his motion within which to file the bill of exceptions.

The case below was tried to the court, who gave judgment to the plaintiffs for \$750. The only error complained of is that this judgment is not sustained by sufficient evidence.

The plaintiffs' right to recover of the defendant depended upon the question of whether there were any profits made by the corporation during the two years following the making of the agreement sued upon. To the extent of any such profits up to \$1,250, the plaintiffs were entitled to judgment.

On behalf of the plaintiffs there was evidence tending to show that the corporation had made a net profit during the two years covered by the inquiry somewhat in excess of the judgment given the plaintiffs. On behalf of the defendant, there was evidence tending to show that the business had been conducted at a considerable loss, and that the defendant had contributed out of his own personal means sufficient money to keep the concern going. It is apparent that great difficulty must have been experienced by the trial court in arriving at any exact determination of the profits of the corporation. The books and records of the company were in confusion, and the defendant's ownership of all the stock seems to have lead to something of an intermingling of his personal finances with company affairs.

The trial court, with the witnesses before him, on the evidence presented, rendered judgment for the plaintiffs in the amount indicated, and we are unable to say that the judgment is against the weight of the evidence.

While the burden rested upon the plaintiffs to establish by the required degree of proof that profits were made during the period named in the contract, and the amount of such profits, still the judgment should not be disturbed merely because the amount of the judgment does not correspond to the exact dollar to the profits shown, if there was evidence which would sustain a finding that the profits were at least as large as the judgment rendered. Such a judgment is not necessarily illogical, and even if it be so, it is because of the defendant's carelessness in not so

keeping the books and records of the corporation under his control, as to be able when called upon to render a clear and unimpeachable accounting of its profits.

Judgment affirmed.

DISTRIBUTION UNDER A VENDOR'S LIEN.

Circuit Court of Cuyahoga County.

JOHN CECIVALA V. DAVID MADAK ET AL; AND DAVID
MADAK V. JOHN CECIVALA.

Decided, June 17, 1912.

Vendor's Lien—Exemptions.

There is no exemption as against a vendor's lien, and when the premises upon which the lien is established have been sold and the money is in the hands of the clerk of the court, the lien will be transferred to the fund, to be paid before any exemptions can be allowed the judgment debtor.

H. F. Payer, for plaintiff in error.

Hart, Canfield & Croke, contra.

NIMAN, J.; MARVIN, J., and METCALFE, J. (sitting in place of Winch J.), concur.

The first of these actions is here on appeal; the other is a proceeding in error.

By the proceeding in error, the plaintiff in error seeks to reverse the judgment of the court of common pleas overruling his motion for the allowance of \$500 exemptions in lieu of a homestead out of a certain fund in the hands of the clerk of courts, which the defendant in error seeks to have applied on a judgment rendered in his behalf in the action below against the plaintiff in error.

Inasmuch as the right of a judgment debtor to have exemptions allowed him in lieu of a homestead depends upon the existence of certain facts, those facts must be established by evidence of the proper kind, and when it is sought to review the

1914.]

Cuyahoga County.

action of a court in passing upon a motion for an allowance of such exemptions, the evidence on which the trial court acted must be brought before the reviewing court. There is no bill of exceptions here, and we unable to pass upon the question raised in the error proceeding, and the petition in error will be dismissed.

In the appeal case, the following state of facts appears:

Prior to October 25, 1910, the plaintiff, John Cechvala and Burt Madak were the owners of a piece of real estate in the city of Cleveland and a saloon business conducted on said real estate. Each party owned an undivided one-half interest in the real estate and saloon business. On the day mentioned the defendant, David Madak, purchased the interest of the plaintiff in the real estate and saloon business for \$700, according to the claim of the plaintiff, which was disputed by said defendant, who claimed to have bought the plaintiff's interest in the property for \$20. The plaintiff was not paid at the time of the sale, and was given no note or security of any kind. A few months after this transaction took place, David Madak and Burt Madak sold the premises to the Hanover Realty Company for \$3,000. The company, after paying various incumbrances out of the purchase price, had left in its possession a balance of \$613.43 due the Madaks. Burt Madak assigned his interest in the money, which was a one-half interest, to David Madak.

The plaintiff, after the sale had been made to the Hanover Realty Company, began suit against David Madak to recover the sum of \$700. The Hanover Realty Company was made a defendant in the action. The petition contained averments to the effect that said company had in its hand the balance of the purchase price due Burt and David Madak, and a part of the prayer asked that the company be ordered and directed to pay over to the plaintiff the net proceeds of the sale.

The plaintiff also obtained an attachment and the Hanover Realty Company was made garnishee. The company then filed an interpleader and was ordered to pay the clerk the money in its hands belonging to the defendant, David Madak.

David Madak then filed an answer and cross-petition in which he denied the claim of the plaintiff, and prayed that the money in the hands of the clerk be paid to him.

The jury returned a verdict for the plaintiff against the defendant, David Madak, for \$721 on which judgment was duly entered.

The defendant then filed a motion for the allowance of \$500 in lieu of a homestead out of the fund paid to the clerk by the Hanover Realty Company. It is this motion that is now before us. We are met with the contention on behalf of the plaintiff that this is not such a judgment or final order as may be appealed from.

The plaintiff claims the fund in the hands of the clerk as against the defendant's demand for exemptions on the theory that he had a vendor's lien on the premises sold to said defendant, and that the fund arising from the sale of real estate should be charged with this lien. There being conflicting claims to the fund in question, and one of those claims involving the application of equitable principles, we are of the opinion that the motion should be treated as one in effect asking for an order of distribution, and that either party concerned might appeal from the decision of the court on such motion.

This leaves for decision, then, on the facts before us in the form of an agreed statement of fact, and the evidence offered, the one question whether under a vendor's lien the plaintiff is entitled to an order for the payment to him to apply on his judgment, the entire fund, or any part thereof, except that in excess of \$500 which he is admittedly entitled to recover in the hands of the clerk, representing the balance of the price of the premises sold by the Madaks to the Hanover Realty Company.

The defendant, David Madak, is entitled to \$500 exemptions in lieu of a homestead out of this fund, provided he is not prevented from receiving it on account of the lien claimed by the plaintiff.

In *Neil v. Kinney*, 11 O. S., 58, it was held:

"A vendor's lien upon land sold for the purchase money, is an equitable right arising from a constructive trust, and is independent of the possession of the land to which the lien attaches as an incumbrance."

The plaintiff had a vendor's lien upon the real estate sold to David Madak for the unpaid purchase price. The real estate

1914.]

Lucas County.

has been sold and the balance of the money received from the sale, after paying incumbrances and other claims, is in the custody of the court and under its control. The lien which the plaintiff had against David Madak's interest in the real estate may therefore be transferred to the fund. Since the plaintiff, however, sold to David Madak only an undivided one-half interest in the real estate, his lien will attach to only one-half of the fund. The other half was acquired by David Madak from his brother Burt Madak, by assignment. As to this interest in the money in the hands of the clerk, the plaintiff can have no lien, and to the extent of such one-half interest the defendant is entitled to have his claim for exemptions allowed. The other half will be ordered paid to the plaintiff.

DETERMINATION AS TO LIABILITY ON A JOINT NOTE.

Circuit Court of Lucas County.

MONROE P. HOLMES v. FRANK CAIRL.

Decided, February 10, 1912.

*Promissory Notes—Error in Giving Judgment Against One Maker
Without a Finding as to the Liability of the Other.*

Where the liability on a promissory note is joint only, it is error to adjudicate as to the liability of one maker, without passing judgment as to the liability of the other joint obligor.

F. J. Flagg, for plaintiff in error.

George C. Bryce, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the Court of Common Pleas of Lucas County.

In the court of common pleas Frank Cairl brought an action against Monroe P. Holmes and Dale G. Holmes to recover upon a joint note executed by them to him, dated July 5, 1909. The defendants answered separately, setting up a claimed breach of warranty and false representations in the sale of a horse, and

claimed the invalidity of the note and asking a judgment against Cairl for damages.

Cairl filed a pleading denominated a reply and answer to the amended answer and cross-petition of Monroe P. Holmes. In that reply he sets forth the allegations contained in a petition filed against him by Monroe P. Holmes, averring facts tending to show the invalidity of this same note and asking to have its transfer enjoined and the note declared a nullity, and praying for damages in that action for \$255 and for an injunction. He sets up further in the reply that the prior action was tried to a jury in the Common Pleas Court of Lucas County and resulted in a verdict and judgment in favor of said Frank Cairl. To this defense contained in the reply, Monroe P. Holmes filed a demurrer. The court of common pleas overruled the demurrer and the defendant, Monroe P. Holmes, not desiring to plead further, the court rendered judgment against him for the amount claimed upon the note, leaving the action to proceed further in the common pleas court against the remaining defendant, Dale G. Holmes. To this judgment Monroe P. Holmes prosecutes error in this court, insisting that the judgment in the prior case as set forth in the reply is not a bar to this action. He cites and relies upon two cases, *Cramer v. Moore*, 36 O. S., 347, and *Porter v. Wagner*, 36 O. S., 471. A careful examination of those cases indicates that in each case the decree which was held not to be a bar was one in equity, dismissing the petition which, for manifest reasons, ought not to be a bar to a subsequent action brought at law.

In the case now under consideration, it appears that the claims set up were litigated and adjudicated by a trial before a jury in the original case set forth in the reply, and we think the court of common pleas did not err in holding that the prior action was a bar, and in overruling the demurrer to the reply. The common pleas court, however, went further and entered a final judgment against the defendant, Monroe P. Holmes, for an amount claimed to be due upon this joint promissory note, without passing upon the liability of the other maker of said note. In so doing, we think the common pleas court erred to the prejudice of Monroe P. Holmes. The liability upon the note

1914.]

Cuyahoga County.

being a joint one only, and not joint and several, the court had no power or authority to adjudicate as to the liability of one signer without at the same time determining as to the liability of the other. We call attention to the following cases which seem to be conclusive upon this matter: *Carr v. Beckett*, 1 C. C., 72; *Aucker v. Adams*, 23 O. S., 543; *Hempy v. Ransom*, 33 O. S., 312, 317; *McCoy v. Jones*, 61 O. S., 119; *Schuch v. Groh*, 10 C. D., 815; 4 Abb., 248.

For the single error in entering final judgment against Monroe P. Holmes before the final determination of the case, the judgment will be reversed and the case remanded for further proceedings.

SUSPENSION FROM A CATHOLIC ORDER FOR MARRIAGE TO A DIVORCED PERSON.

Circuit Court of Cuyahoga County.

KATHERINE PINTA KOUKOLICEK v. THE LADIES CATHOLIC
BENEVOLENT ASSOCIATION.

Decided, June 17, 1912.

Fraternal Beneficial Association—Remedy Within Order Must be Exhausted—Lawful Rules of Such Association—Practical Roman Catholic—Marriage to Divorced Person.

1. Where an individual becomes a member of a fraternal beneficial association, he is bound to exhaust the remedies provided by its constitution and by-laws, not opposed to the laws of the state, which provide for the redress of grievances between members and the organization, and until he has done so he can not appeal to the courts for relief on account of such grievances
2. The requirement that none but practical Roman Catholic women may become members of a fraternal beneficial association or of any of its branches is one which the organization has a right to embody in its constitution and by-laws.
3. Marriage to a divorced person whose divorced husband or wife, as the case may be, is still living, is a violation of one of the rules or canons of the Roman Catholic Church, and a person who has committed this offense against the church, can not, under its laws, remain a practical Catholic.

J. W. Sykora, for plaintiff.
Hart, Canfield & Crock, contra.

NIMAN, J.; MARVIN, J., and WINCH, J., concur.

The action is here on appeal. The defendant, the Ladies Catholic Benevolent Association, is a mutual insurance and benefit association, incorporated under the laws of the state of Pennsylvania and transacting business in the state of Ohio. It insures the lives and health of its members and maintains social relations between its members.

The defendant, the St. Cecilia Branch No. 349 of the Ladies Catholic Benevolent Association, is one of the subsidiary organizations of the defendant association first named.

Section 4 of Title I of the supreme constitution of the association provides for the qualifications of members in the following language:

“None but practical Roman Catholic women may become members of the Ladies’ Catholic Benevolent Association, or of any of its branches.”

The plaintiff became a member of the St. Cecilia Branch of the association, and thereby of the association itself, on December 3, 1903. She thereby became entitled to all of the rights and benefits belonging to members of the organization, and acquired insurance upon her life for the sum of \$1,000 payable to certain beneficiaries.

At the time the plaintiff joined the St. Cecilia Branch of the association, she possessed the qualifications necessary to render her eligible to membership in the association. She remained a member in good standing until November 7, 1907, when she was suspended. Her suspension was followed by such action on the part of the organization, that on or about June 4, 1908, she was expelled.

The ground of her suspension and expulsion from the association was, that on or about September 3, 1907, she had married a divorced man whose divorced wife was still living, and had thereby violated one of the rules of the Catholic Church, and had ceased to be a practical Catholic.

1914.]

Cuyahoga County.

By this action the plaintiff seeks to enjoin the defendants from refusing her the rights and benefits of a member of the association, and from cancelling or making void her insurance in the organization, and in case such relief can not be granted her, she asks for an accounting of the money paid by her as premiums or assessments and a recovery of the same. Her right to the relief sought is disputed by the defendants on the ground that she had not exhausted her remedies within the association, and until she had done so, she has no standing in the civil court to obtain redress for the alleged wrongs done her by the organization of which she was a member.

In *Meyers et al v. Jenkins, Admr.*, 63 O. S., 101, it was held as follows:

“The members of a lodge of the Independent Order of Odd Fellows are not liable to another member of the same lodge for sick benefits, unless there is some law of the order expressly making them so liable. The obligation to pay sick benefits, as the laws of the order in this state stood in the year 1890, rested alone upon the lodge, and not upon the members thereof.

“When a member of such order claims to be entitled to sick benefits, he must seek his remedy in the first instance, in the lodge and the tribunal of the order and the determination of the matter by such lodge and tribunal in substantial accordance with the laws of the order, will be final and conclusive of the right to receive such benefits.

“If the lodge refuses or neglects, upon proper demand, to have the right to such benefits determined in substantial accordance with the laws of the order, or refuses to pay such benefits after the same have been awarded to such member, then such member may sue in the civil courts for the recovery of such benefits.”

We consider it settled, then, that where an individual becomes a member of an organization such as this, he is bound to exhaust the remedies provided by the constitution and by-laws, not opposed to the laws of the state, which provide for the redress of grievances between members and the organization, and until he has done so he can not appeal to the courts of the state for relief on account of such grievances.

Section 61, of Title I, of the constitution and by-laws of the Ladies' Catholic Benevolent Association provides for the filing of

charges against any member of a branch who violates the obligations of the association, and for the trial of such member. The sixth paragraph of the section reads as follows:

“If after a fair and impartial trial the charges are proven, the accused may be fined, reprimanded, suspended, or expelled as a majority of the board of supreme trustees may determine.”

By virtue of other sections of the constitution and by-laws of the association, a member of a branch feeling dissatisfied at the decision rendered upon any charge or complaint, may appeal from the board of supreme trustees to the supreme council of the association.

The evidence fails to show that the plaintiff prosecuted any appeal. She was notified of the proceedings against her and every opportunity was given her at every stage to protect her rights. She did not take advantage of the rights given her by the constitution and by-laws of the organization to defend herself, and having failed to exhaust her remedies within the association she has failed in an essential part of her case. Notice to the plaintiff that she had been expelled by the supreme council does not, in our opinion, avoid the necessity of proof that she had prosecuted the appeal provided for by the constitution and by-laws. The fact that she had been expelled by the supreme council would not necessarily imply that an appeal would be taken in vain.

The requirement that none but practical Roman Catholic women may become members of the association, or of any of its branches, is one which the organization had a right to embody in its constitution and by-laws. The association also had the right to require of its members, once admitted, that they continue to be practical Catholics, and to provide for the expulsion of those who cease to be such.

Marriage to a divorced person whose divorced husband or wife, as the case may be, is still living, is a violation of one of the rules or canons of the Catholic Church, and a person who has committed this offense against the church can not, under its laws, remain a practical Catholic.

When the plaintiff married a man who had been divorced from his wife, whose divorced wife was still living, she ceased to be a

1914.]

Cuyahoga County.

practical Catholic, and under the constitution and by-laws of the association, was subject to removal as a member thereof. No law of the state and no principle of public policy is violated by the insistence of the organization on the observance of this rule of the church, as a condition of the retention of membership therein.

It follows that the relief prayed for by the plaintiff must be denied and her petition dismissed.

**RESTRICTION AS TO VALUE OF IMPROVEMENTS WHICH MAY
BE MADE.**

Circuit Court of Cuyahoga County.

MARY DEAN SNYDER AND F. E. SNYDER v. THE LAKEWOOD
LAND & IMPROVEMENT COMPANY.

Decided, June 10, 1912.

Building Restrictions.

A restriction in the deed of certain premises that "no house shall be erected upon said premises at a less cost than \$3,500," is violated by moving a barn upon the lot and converting the same into a house, the building after all alterations and repairs being of less value than \$3,500.

NIMAN, J.; MARVIN, J., and SHIELDS, J. (sitting in place of Winch, J.), concur.

This proceeding in error had its inception in an action brought in the court of common pleas by the defendant in error, the Lakewood Land & Improvement Company, against the plaintiffs in error, Mary Dean Snyder and F. E. Snyder, to enjoin said defendants from violating a building restriction. The judgment in the court below was for the plaintiff. The defendants filed a motion for a new trial, which was overruled and they are here seeking a reversal of the judgment of the court below.

Briefly stated, the facts are as follows: the Lakewood Land & Improvement Company is the owner of an allotment of real estate in the city of Lakewood, known as the Belle avenue allot-

ment which contains 134 lots, some of which front on Madison avenue, some upon Belle avenue, and some upon Detroit avenue. All the lots in the allotment, except those fronting on Detroit avenue, are subject to uniform restrictions. On or about the 14th day of August, 1911, the plaintiff in error, Mary Dean Snyder, purchased on a land contract one of the lots in said allotment fronting on Madison avenue. In the contract the same restrictions were imposed upon the lot purchased as attach to the other lots in the allotment except those on Detroit avenue. That part of the restrictions necessary to be noticed here is as follows:

“No house shall be erected upon said premises at a less cost than \$3,500 and shall be set back from the street line a distance of not less than 45 feet.”

At the time of the purchase of this lot by the said Mary Dean Snyder, there stood partly upon the lot purchased by her and partly upon another lot, a barn, which by the terms of the purchase went with the lot. After the contract was executed, the plaintiff in error moved the barn on to the lot purchased by them, and, having made various alterations and repairs, moved into the same and occupied it as a place of residence. The building after alterations and repairs is admittedly of a less value than \$3,500.

The question here to be decided is: Whether or not the restriction that “no house shall be erected upon said premises at a less cost than \$3,500” has been violated by the fitting up of this barn as a place of residence and the living therein by the plaintiffs in error.

It is contended upon behalf of the plaintiffs in error that there has been no erection upon said premises of a house costing less than \$3,500, and that the occupancy of this barn, which is claimed to be temporary only, does not violate the restriction.

The effect, however, of the converting of this barn into a dwelling-house upon the other lots sold by the defendant in error and upon the lots retained by it, is the same as though a new building of the same character and value had been erected and, in our opinion, there has been a plain violation of the restriction imposed upon this lot. The purpose of this restriction was to ob-

1914.]

Lucas County.

tain uniformity in the character of buildings erected in the allotment and preserve the appearance and enhance the value of all the lots in the allotment as a desirable and attractive place for the establishment of homes. This purpose would be defeated, in part at least, if the plaintiffs in error were permitted to continue in the use of this barn as a place in which to live. They had a right to move the barn entirely on to the lot under the contract, but when they proceeded to convert it into a house, they violated the restriction, as much as though they had erected an entirely new house of equivalent value.

The court below, therefore, committed no error in granting a perpetual injunction as prayed for in the petition, but in our opinion the judgment of the court below should be modified to such an extent as to give the plaintiffs in error a reasonable time to make preparation for another place of residence, and the judgment of the court below will be so modified as to give the plaintiffs in error until the 15th day of September, 1912, to permanently vacate said structure and abandon the same as a dwelling-house. The judgment, as so modified, will then be affirmed.

ACTION FOR FALSE IMPRISONMENT.

Circuit Court of Lucas County.

EDWARD R. SLY ET AL V. OGLE ROBINSON.

Decided, December 9, 1911.

Larceny—Taking Goods From Store Without Paying for Them—Arrest on Loose Form of Affidavit—Attorneys Fees Not an Element of Damage, Unless.

1. It is larceny if a person engaged in a cash purchase take away from a store, over the protest of those in charge, and convert to her own use goods which have not been paid for and which have been purchased under circumstances which led the clerk to believe it was to be a cash transaction.
2. An affidavit for arrest for larceny is loosely drawn where the thing taken is described only as "merchandise," but a justice of the peace acting in good faith in the issuing of a warrant upon such an affidavit is not liable to an action for false imprisonment.

3. An instruction to the jury in an action for false imprisonment that they may, if they choose, include attorney's fees as a part of the compensatory damages, is erroneous where the qualification is not added that such an award can only be based on a finding that the defendant acted through fraud or malice or for purpose of insult.

L. M. Murphy and B. F. Ritchie, for plaintiffs in error.

Files & Paxson, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to Lucas County Common Pleas Court.

This is a proceeding in error to reverse a judgment rendered in the common pleas court. Mrs. Ogle Robinson, who was plaintiff in the common pleas court, brought an action against Edward R. Sly, L. W. Black and Henry S. Bradley to recover damages for false imprisonment. Sly was a justice of the peace at Whitehouse in this county, and Henry S. Bradley was constable, and L. W. Black was engaged in the mercantile business at that village. Mrs. Robinson was a tenant of Black and had voluntarily turned out to him on account of rent which she owed a certain rug and a chair. It developed later that the rug was of sufficient value to pay the rent due so that Black held the chair thereafter, subject to her order, with the information that it might be sold to one Demuth. The chair was valued by the parties at \$7.50.

While it so remained in the possession of Black, Mrs. Robinson and her sister conceived the plan of securing from the store conducted by Black a sufficient amount of dry goods to equal the value of the chair and to compel Black to retain the chair as owner in payment for the dry goods so to be obtained by her. Thereupon, she wrote the following note:

"MR. BLACK: I will just take the goods in payment for that chair if you want it so bad. If you had not told me Mr. Demuth wanted it, I would have brought it up home when I moved. Hereafter when anybody is square with you, go thou and do likewise.

"Sincerely yours,
"OGLE OVERMYER ROBINSON."

1914.]

Lucas County.

The same evening that this note was written Mrs. Robinson and her sister and one Helstern took the note to Black's store in Whitehouse. Mrs. Robinson fearing that she would be identified and unable to carry out the scheme, sent her sister into the store with Helstern. The sister ordered of the clerk, who was a son of Black, certain dry goods designated by Mrs. Black, being careful to see that the value did not exceed \$7.50; the actual value of the goods so ordered being \$7.42. When the goods were wrapped up she threw on the counter the note written by Mrs. Robinson to Black and proceeded to depart with the goods. The clerk undertook to prevent her carrying away the goods without paying for them but she held on to the goods and departed. The clerk followed them to the door and said in the presence and hearing of Mrs. Robinson that they would all be arrested for taking the goods. Thereupon L. W. Black went to the justice of the peace, E. R. Sly, and informed him fully of all the facts and Mr. Sly drew an affidavit which was signed and sworn to by Black in which it is charged as follows:

"That Ogle Robinson and unknown man and woman on or about the 27th day of September, 1909, at the county of Lucas, did unlawfully steal, take and carry away merchandise to the value of seven dollars and forty-two cents, the property of the said L. W. Black."

Upon the filing of this affidavit with the justice he issued a warrant directed to any constable of the county reciting substantially the language of the affidavit and commanding the arrest of the parties. Constable Bradley reached the home of Mrs. Robinson not long after she and her sister arrived there and arrested them and Helstern, and detained Mrs. Robinson and her sister at his own residence in Whitehouse until the following morning, when he took them before a justice of the peace.

The foregoing facts are not controverted by any of the parties to the transaction. When the parties reached the office of the justice of the peace the defendants were arraigned and the affidavit read to them. Mrs. Robinson testified that she then

stated to the justice of the peace that she took the goods but did not steal them. The justice treated her statements as a plea of guilty and proceeded to sentence the defendants. He, however, suspended the sentence, except the costs, which were subsequently paid by Mrs. Robinson's mother.

The trial in the common pleas court resulted in a verdict of \$550 against all of the defendants and in favor of Mrs. Robinson; that court, however, granted Black a new trial and the plaintiff being required so to do remitted \$200 from the verdict against the other defendants, and judgment was rendered accordingly.

We are unanimously of the opinion that the transaction as testified to by Mrs. Robinson herself, constitutes the offense of larceny. The authorities are quite uniform and are collected in 25 Cyc., 25. The rule as so stated is:

"Where parties are engaged in a cash sale, the whole transaction is incomplete until the payment is completed, and possession of the goods remains in the seller and that of the money in the buyer until they are simultaneously exchanged. If in such case the buyer gets control of the goods and makes off with them without paying for them, he is guilty of larceny. And conversely, if the seller gets the money and refuses to give up the goods, it is larceny."

I cite also *Hildebrand v. The People*, 56 New York, 394. The rule just mentioned is peculiarly applicable in Ohio in view of the language of our uniform sales law as contained in Section 8422, General Code.

It is strenuously insisted in argument that the affidavit which undertook to charge larceny is wholly insufficient for that purpose and was so defective that the justice acquired no jurisdiction to issue the warrant. This contention is based largely upon the decision of our Supreme Court in *Redmond v. State*, 35 O. S., 81, in which "a certain lot of dry goods" was held to be an insufficient description when the indictment is assailed by a demurrer.

We need not determine in this case whether this affidavit would or would not be vulnerable if so assailed. The only question we have here, so far as the affidavit is concerned, is

1914.]

Lucas County.

whether it is absolutely void or whether it was sufficient in form to give the justice jurisdiction. It must be remembered that the justice of the peace had jurisdiction generally over this class of offenses as an examining magistrate, and that in the exercise of that jurisdiction he held the affidavit sufficient. While not recommending the charging of offenses in such general language as is used in this affidavit in employing the word "merchandise," yet we are clearly of the opinion that under the circumstances in this case the justice of the peace had jurisdiction, and if acting in good faith would not be liable in an action for false imprisonment. This rule has been laid down in many cases and we can only stop to cite a few: *Gardner v. Couch*, 137 Michigan, 358; *Smith v. Jones*, 16 South Dakota, 337; *Rush v. Buckley*, 70 L. R. A., 464.

On the trial of the case in the common pleas court the judge directed a verdict in favor of the plaintiff, leaving to the jury the assessment of damages only. For the reasons given, this action of the trial court was erroneous. In charging the jury the trial court instructed them that they might, if they chose, include as a part of the compensatory damages, attorneys' fees. This instruction was given to the jury without any qualification that attorneys' fees could only be allowed in the event that it appears in the case that the defendants had acted maliciously. It has, however, been the rule in Ohio as laid down in *Roberts v. Mason*, 10 O. S., 278, *Diehl v. Friester*, 37 O. S., 473, 478, and *The United Power Company v. Matheny*, 81 O. S., 204, that attorneys' fees may be included in actions of this kind as a portion of the compensatory damages, but that it can only be so done when it appears that the defendants have acted through fraud, malice or insult.

As a result of a careful examination of the record, we are all of the opinion that the verdict is not sustained by the evidence. For the errors indicated the judgment will be reversed and the cause remanded.

**ASSUMPTION OF RISK IN ATTEMPTING TO BOARD A
MOVING CAR.**

Circuit Court of Cuyahoga County.

W. R. SMILLIE V. THE CLEVELAND RAILWAY COMPANY.

Decided, June 10, 1912.

*Negligence—Boarding Moving Car—Charge—Concrete Rule Correct,
But General Language Erroneous.*

1. In a personal injury damage case if a correct concrete rule of conduct applicable to the facts of the particular case is given in charge to the jury, it is of no importance whether the observance of the rule is ascribed to the exercise of reasonable care or of the highest degree of care.
2. In an action for damages for injuries resulting from negligently starting a car which plaintiff was about to board as a passenger, it is proper to charge that one who undertakes to get on a moving car, assumes such risks as are incident thereto, and if injured thereby can not recover.

A. W. Lamson, for plaintiff in error.
Squire, Sanders & Dempsey, contra.

NIMAN, J.; MARVIN, J., concurs; WINCH, J., not sitting.

The action in the court below was for the recovery of damages on account of injuries claimed to have been sustained by the plaintiff in being thrown or jerked from the step of a street car operated by servants of the defendant, as he was mounting the platform of the car.

The verdict was for the defendant and the plaintiff in error seeks by this proceeding to reverse the judgment rendered thereon, after the overruling of his motion for a new trial.

The errors complained of relate to the charge of the trial court to the jury. Not all the evidence is before us, but only so much as counsel for the plaintiff in error considered necessary to disclose the alleged errors in the charge.

The petition charged that the car on which the plaintiff attempted to get, had come to a full stop for the purpose of receiv-

ing the plaintiff and other passengers, and while the plaintiff was in the act of boarding the car, it was started suddenly forward with a great jerk, with such force and violence that it threw the plaintiff backward and over and around the rear of the car and thereby broke his hold from the same and threw him to the ground.

From such evidence as is before us, and from the charge of the jury, however, it appears that the car had not come to a full stop, and the case was tried and presented to the jury upon the theory that the car had not fully stopped when the plaintiff attempted to get on.

One portion of the charge claimed to be erroneous is in the following language:

“And this brings me to the duty of the defendant company in this instance, and the correlative duty of the plaintiff, for the right to recover for injuries received must rest upon the fact that the defendant violated some duty it owed to the plaintiff. The duty of the defendant in this respect to the plaintiff was, if it stopped the car or brought it to such a slow rate of speed as to be an invitation for the plaintiff to board, or attempt to board the car, then it was the duty of the defendant, in the exercise of reasonable care, to keep the car in that condition long enough so that the plaintiff, in the exercise of reasonable care, might with safety board the car.”

One objection urged against this part of the charge is that it might and did lead the jury to believe that after holding the car the length of time sufficient to permit the plaintiff, with ordinary care, to get safely on the car, without regard to any position of danger he might be in at the time, it would not be negligence to start the car and throw him off.

If the evidence were such as to show knowledge of a dangerous position on the part of the plaintiff, chargeable to those operating the car, this argument would have greater weight than in this case, with such evidence as is before us. We do not think the jury could have been misled in the manner suggested by the language quoted.

Another objection to this part of the charge, in connection with other language in which the court defined negligence, is that the duty of the defendant company toward the plaintiff, and the

degree of care required of the defendant are not correctly stated.

The definition of "negligence," to which exception is taken, follows the court's instructions concerning what acts of the plaintiff could render him guilty of negligence so as to defeat any recovery. The language of the definition is as follows:

"I have used the words 'negligence' and 'negligently.'

"Now, 'negligence' means simply the want of ordinary care under the circumstances surrounding that particular case and the transaction in question, and 'negligently' simply means doing an act in such a manner that it lacks the care which men of ordinary prudence and foresight use in their everyday affairs of life under the same or similar circumstances."

This definition, immediately following the court's discussion of what would be negligence in the plaintiff, refers to that negligence and is a correct definition.

Even if this were not so, the court, in the other part of the charge first quoted, in clear terms instructed the jury, that it was the duty of the defendant, if it stopped the car, or brought it to such a slow rate of speed as to be an invitation for the plaintiff to board, or attempt to board the car, to keep the car in that condition long enough so that the plaintiff, in the exercise of reasonable care, might with safety board the car.

This instruction was a correct statement of the defendant's duty toward the plaintiff, and the inclusion of the words "in the exercise of reasonable care," does not in any way modify the duty as charged.

If a correct concrete rule of conduct is laid down to govern the particular case, it is of no importance whether the observance of the rule is ascribed to the exercise of reasonable care or the highest degree of care. The jury were properly instructed on the subject of the defendant's duty toward the plaintiff, and the exercise of the highest degree of care by the defendant required the observance of no other or greater duty than that laid down by the trial court in the instructions under consideration. There was therefore no error in this regard.

Complaint is also made of the instructions to the jury on the subject of the effect of the act of one who attempts to get on a moving car.

1914.]

Cuyahoga County.

On this subject the court said :

“The fact that a car does not stop at a regular stop is not an act of negligence upon which recovery can be had, and if one undertakes to get on a moving car, he assumes such risks as are incident thereto, and if he is injured, he can not recover.”

Again the court said :

“So if the plaintiff has failed to prove by a preponderance of the evidence that this car, at this time after it came around the corner at East 9th street and Prospect avenue, slowed down to a standstill or to such a slow rate of speed that one standing there ready to get on the car would, in the exercise of ordinary care, reasonably have supposed that the car was stopped or just on the point of stopping, for the purpose of letting him on, or in other words, inviting him to get on the car, he can not recover, and your verdict must be for the defendant.”

In one of the requests of the defendant given by the court, it was said :

“If you find that the car was going at the rate of from four to five miles an hour at the time the plaintiff attempted to board the same, there can be no recovery in this case and your verdict must be for the defendant.”

The objection urged against these instructions is that they leave out the question of negligence on the part of the defendant and the question of proximate cause.

Both the defendant's negligence and the subject of proximate cause are, however, dealt with in other parts of the charge. The instructions embody correct principles of law and must be read in connection with what was said by the court in other places on the subjects mentioned. They are sustained by *The Ohio Central Traction Co. v. Mateer*, 12 C.C.(N.S.), 327, affirmed without report in *Mateer v. The Ohio Central Traction Co.*, 81 O. S., 494, where it was held :

“A judgment for damages in favor of an intending passenger who was injured in an attempt to board a car is not supported by the evidence, where it appears that the attempt to board the car was made and the injury occurred before the car had been brought to a standstill.”

The charge in this case considered as a whole, in our opinion, properly instructed the jury as to the rights and duties of the parties to the action, and correctly stated the law applicable to the facts.

We find no error in the record prejudicial to the plaintiff in error, and the judgment of the court of common pleas is affirmed.

ACTION ON BOND TO SECURE PERFORMANCE OF CONTRACT.

Circuit Court of Summit County.

J. B. WAIGHT v. J. F. ADAMSON AND T. H. CLARK.

Decided, April 15, 1912.

Fraudulent Representations—Knowledge of Plaintiff as to Falsity.

In an action on a bond where a defense is that the defendant was induced to sign the bond by reason of false statements made by plaintiff or by another with his knowledge and acquiescence, it is error to charge the jury that in order to make good his defense the defendant must prove not only that the statements were made, were false, were believed and acted upon by the defendant, but also that the plaintiff at the time he made them or acquiesced in their being made, knew them to be false.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

The issues in this case are admirably stated in the charge made on the trial in the court of common pleas.

From this charge we read:

“This action is against the defendants to recover the sum of \$1,531.63 on a certain bond, which is in evidence in this case, which was given to secure the performance by the defendant Clark of the terms of a contract of sale made between the plaintiff and said Clark.

“This contract is also in evidence. The defendant Clark, though duly served with process, has failed to answer or otherwise plead, and has thereby confessed the truth of plaintiff's allegations so far as he is concerned, and your verdict will necessarily be for plaintiff as against Clark.

“The defendant Waight admits the execution of the bond, but defends against liability therein upon two grounds, namely:

1914.]

Summit County.

"1. That the bond was put into the custody of Clark upon the express stipulation and condition that it was not to be delivered to plaintiff until certain parties had been secured by contract to put the capital into the business in which Clark and the plaintiff were then engaged, necessary to run the same, otherwise Clark was to hold the bond and destroy the same or return it to Waight, and the plaintiff knew of these stipulations and conditions and received the bond when Clark wrongfully and without right and authority delivered the same to him.

"2. That he was induced to execute said bond by the false representations and statements made by plaintiff and said Clark, as to the condition of the business then conducted by them, their assets, debts and profits.

"Now, the admissions in the pleadings and undisputed facts show that plaintiff and Clark were carrying on a lumber and coal business in Akron as partners under the name of the Peoples Lumber & Coal Company; that on August 27, 1910, Clark bought the plaintiff's interest in said partnership and said purchase was evidenced by the written bill of sale and contract in evidence; that by said agreement Clark was to pay plaintiff \$1,351.63 on or before September 12, 1910, to assume and pay the liabilities of the firm, except one debt especially mentioned, and to furnish a bond to secure the performance of his part of that contract of sale; that the bond in evidence in this case was delivered by Clark to the plaintiff.

"Among other things the bond, by its terms, bound the two signers thereof, the defendants in this cause, to the payment of the said \$1,351.63.

"The admission of the execution of the bond and the plea of the defendant Waight of avoidance of liability thereunder, puts the burden upon him of showing by a preponderance of the evidence that he is not liable for the reasons alleged in his answer."

This is followed in the charge by a true statement of the law as to the first defense.

As to the second defense, the court used this language:

"Under the second defense, in order to avoid liability it has been essential that the defendant Waight shall have proven by a preponderance of the evidence, that plaintiff made false statements and representations, or allowed Clark to make them to defendant in his presence and with his acquiescence and consent, as to the condition of the business being conducted by them under the firm name of the Peoples Lumber & Coal Company, their debts, assets, profits and other matters affecting the finan-

cial condition of the firm and its members, that there were material facts bearing directly upon the transaction culminating ultimately in the giving of the bond in question, that plaintiff knew the statements to be false, that defendant Waight believed the statements and representations to be true and acted upon them, and that the plaintiff made the representations with intent that they should be acted upon, or acquiesced in and consented to the making of the same by Clark, with intent that Waight should act upon them. Failing to prove these by a preponderance of the evidence, defendant Waight must fail on his second defense. If he has established them by a preponderance of the evidence, then upon that defense you should not return a verdict against Waight."

Again the court said:

"There is fraudulent intent if a man, either with a view of benefitting himself or misleading another into a course of action, makes a representation which he knows is false or does not believe to be true."

We regard this part of the charge as containing error prejudicial to the plaintiff in error.

The evidence tended to show that Adamson knew what the statements contained in the contract, attached to the bond, were. Indeed, when he accepted the bond, he accepted it with the contract attached—the contract signed by both himself and Mr. Clark—and he knew, therefore, at the time he accepted the bond, what representations had been made to Clark as to the property which Clark was buying and the indebtedness of the company which was being assumed by Clark. If these representations as contained in that contract were not true, even though Adamson did not know that they were not true, if they were relied on by Waight and he was induced by them to sign the bond, which he would not have signed but for such representations, he was entitled to his second defense. This is borne out by the case of *Mulvey v. King*, 39 O. S., 491. The syllabus reads:

"Where a person by means of false representations of facts materially affecting the identity and value of certain real estate, induces another to enter into a contract for the purchase thereof, upon the faith of such representations, and upon which he was justified in relying, the purchaser may, in an action brought by the vendor for the purchase price, recoup the damages which he

1914.]

Summit County.

has sustained by reason of such false representations, although the vendor believed them to be true when made, and had good reason for so believing."

Judge Upson, in the opinion in this case at pages 594 and 595, uses this language:

"It may be considered as well settled in this state by the cases above cited, that an action for damages caused by misrepresentation can not ordinarily be maintained, without proof of actual fraud, or such gross negligence as amounts to fraud. When, however, a person claims the benefit of a contract into which he has induced another to enter by means of misrepresentations, however honestly made, the same principles can not be applied. It is then only necessary to prove that the representation was material and substantial, affecting the identity, value or character of the subject-matter of the contract, that it was false, that the other party had a right to rely upon it, and that he was induced by it to make the contract, in order to entitle him to relief either by rescission of the contract or by recoupment in a suit brought to enforce it."

We find no other error in the proceeding which would justify a reversal.

The claim made that the giving of a note by Clark to Adamson for \$250 as an additional amount to be paid for Adamson's interest in the business might raise doubt in our minds, were it not for the case of *Stuts, Admr., v. Strayer, Admr.*, 60 O. S., 384. That case seems exactly in point, and it was there held that the giving of the additional note was not an alteration of the contract on which the party became a surety.

We reach the result that the judgment must be reversed for error in the charge as hereinbefore pointed out.

BREACH OF DUTY OF MASTER TOWARD SERVANT.

Court of Appeals for Lucas County.

BROWN, ADMINISTRATOR, v. DUSHA.

Decided, January 11, 1913.

Employer and Employee—Furnishing Viscious Horse—Resulting in Death of Its Driver—Verdict Finding One Not an Employee Will Not be Reversed, When—Inference that Deceased Was Not an Employee Raised by the General Verdict.

1. In an action to recover damages for the death of one who is alleged to have been in the employment of the defendant and to have met his death by the negligence of the defendant, the claimed breach of duty being the furnishing the employee with a vicious horse to drive in the performance of his work without informing him of its dangerous character, the action is based on the breach of a duty which the master owes to his servant as such, and it is not a duty owing to a mere volunteer.
2. Where, in such case, the bill of exceptions contains all of the evidence and would justify a finding by the jury that the deceased was not an employee, and the charge of the court is free from error on that branch of the case, a judgment for the defendant will be affirmed on the authority of *Sites v. Haverstick*, 23 Ohio St., 626, and *McAllister v. Hartzell*, 60 Ohio St., 69, whether error does or does not exist in a matter relating exclusively to another issue.
3. In such an action, where the answer denies that the deceased was an employee and alleges contributory negligence, and the jury returns a general verdict for the defendant, the inference arises that the jury found that the deceased was not an employee.

A. G. Duer, for plaintiff in error.

Friedman, Taylor & Foster, contra.

RICHARDS, J.; WILDMAN, J., concurs; KINKADE, J., concurs in the judgment.

In the court of common pleas the plaintiff, Joseph Brown, brought an action as administrator of the estate of Phillip Zielinski to recover damages by reason of the death of Zielinski, alleged to have been caused by the negligence of the defendant. It appears that Zielinski, who was seventeen years of age, was

1914.]

Lucas County.

driving a horse and wagon, the property of James Dusha, in the city of Toledo on August 28, 1911, working as a huckster. On the date named Zielinski was kicked in the abdomen by the horse and died soon thereafter. The case was tried to a jury and resulted in a general verdict in favor of the defendant. The petition alleged substantially that the defendant was the owner of a horse and wagon which he used in delivering vegetables and other products as a huckster and that he loaded the wagon on August 28, 1911, with fruit and vegetables and employed Zielinski to drive the horse, which was attached to the wagon, for the purpose of selling and delivering said vegetables and other products to the customers of the defendant. The plaintiff alleges that the horse, as defendant knew, was vicious and dangerous to drive and that it was dangerous for any person to sit on the wagon at the place provided by the defendant, after the wagon was so loaded, and that Zielinski did not know that it was dangerous for him to sit in the place provided for him by the defendant. The petition charged that defendant was aware of Zielinski's ignorance of such fact, failed to inform him or provide a kicking-strap for the horse and failed to provide Zielinski with a safe place in which to sit while driving the horse.

The defendant in his answer denies that Zielinski was in his employment on the occasion in question, denies all negligence and avers that Zielinski himself was guilty of negligence which directly contributed to his death.

Numerous errors are assigned by the plaintiff, but in the view we take of the case it will not be necessary to consider in detail all of them. It will be seen from the pleadings that there were at least three issues in the case, namely, a denial that Zielinski was on the occasion in question in the employment of Dusha, the negligence of Dusha and the contributory negligence of Zielinski. The verdict, being general in form, amounts to a finding on all the issues in favor of the defendant, Dusha. We are authorized, therefore, to infer that the jury found from the evidence that Zielinski on the occasion in question was not a servant of Dusha. The trial court in the general charge said to the jury in substance that if they found that Zielinski was not at the time a servant of Dusha and was not working for Dusha then

the plaintiff could not recover, and this charge, it is insisted, is such prejudicial error as requires a reversal of the judgment. It is argued on behalf of the plaintiff that the averment of the employment of Zielinski by Dusha is an immaterial allegation, and that other allegations of the petition are sufficient to warrant a judgment in the plaintiff's favor if those allegations are sustained by the evidence.

A careful examination of the allegations of negligence contained in the petition disclosed the following: *First*, that the defendant owned a vicious horse which he used in delivering vegetables and other products, by reason of which it was unsafe to sit on the wagon in the place provided; *second*, that defendant knew the horse was vicious, or would, by the exercise of ordinary care, have known it, and that the decedent did not know that fact; *third*, that the defendant failed to inform Zielinski that that horse was vicious or that it was dangerous to sit on the wagon, failed to provide a kicking-strap and failed to provide a safe place to work. Of course, if the jury found from the evidence that Zielinski was not employed on the occasion in question, by the defendant, then it is clear that the defendant owed him no duty to give him information of the vicious character of the horse or that it was dangerous to sit on the wagon, and owed him no duty to provide a safe place to work. The whole case, as set forth in the petition and as developed by the evidence offered by the plaintiff, rests on the breach of duty to use ordinary care for the safety of an employee. The breach of duty which is alleged is the breach of that duty which the defendant owed to Zielinski, if Zielinski were his servant, that is, to inform him that the horse was vicious, that it was unsafe to sit on the wagon in the place provided and the duty to exercise ordinary care to provide a safe place for the servant to work. It will be noted that no application to amend the petition was at any time made, and whatever might be the law, if the petition had been amended in any respect, it is certain that the right of the plaintiff to recover can only be based upon the allegations of negligence as contained in the petition. The duty mentioned is not one owing to a stranger, a mere volunteer. The petition contains no charge of negligently keeping a vicious animal in a pub-

1914.]

Lucas County.

lic place or in a highway where people were accustomed to pass, as in *Hayes v. Smith*, 62 Ohio St., 161, nor does it contain allegations sufficient to bring the case within the rule laid down in *Pennsylvania Rd. Co. v. Snyder*, 55 Ohio St., 342. It is simply a case where the pleader charged Dusha with the breach of certain duties which he owed as master to his servant Zielinski, and therefore it was highly important that the evidence should establish the fact that Zielinski was in truth on this occasion an employee of Dusha. The case is controlled by the same principle that was applied in *B. & O. S. W. Ry. Co. v. Cox, Admr.*, 66 Ohio St., 276. The court in that case, speaking through Shauck, J., say, on page 288:

“There being in the present case neither allegation nor evidence that the fatal injuries were inflicted wilfully or intentionally, there can be no recovery unless there existed between the decedent and the company a relation which imposed upon it the duty of exercising care toward him. Although it was alleged in the petition that he was at the time of the accident in the service of the company and traveling on a freight train in obedience to its orders, the allegation was denied in the answer and refuted by the testimony of the plaintiff herself.”

In the case at bar the allegation was denied in the answer and the denial was evidently sustained by the jury in its general verdict in favor of the defendant. The case but illustrates the principle so often announced that in the absence of wilfulness there can be no actionable negligence unless the duty is one which is created by contract or by operation of law. We find no error in the charge of the court upon the matter to which reference has just been made.

The case is one which is peculiarly within the rule applied in *Sites v. Haverstick*, 23 Ohio St., 626, and *McAllister v. Hartzell*, 60 Ohio St., 69. In the latter case the court say, on page 95. that:

“It is the settled law in this state in a case where the issues are such that a finding of either in favor of the successful party entitles him to the judgment rendered, the judgment should not be reversed for error in the instructions to the jury relating exclusively to the other issue.”

It is insisted by the plaintiff that the court erred in other portions of the general charge, particularly in the charge relating to contributory negligence, and in failing to charge the jury on the law of comparative negligence in accordance with Sections 6243 to 6245-1, inclusive, General Code. It is not necessary to determine whether the sections to which reference has been made are applicable to this case, nor whether the court erred in failing to charge the jury on the law of comparative negligence, for if any such error were committed it would justify a reversal in view of the law as stated in the cases just cited.

It is further claimed that the trial court erred in failing to grant a new trial on the ground of newly-discovered evidence. It is sufficient to say on this subject that the newly-discovered evidence set forth in the bill of exceptions is not of such a character as would have required a different verdict, and for that reason it is insufficient as a basis on which to grant a new trial.

Finding no error justifying a reversal, the judgment of the court of common pleas will be affirmed.

**INJURY SUFFERED AFTER ACCEPTING EMPLOYMENT BUT
BEFORE BEGINNING WORK.**

Court of Appeals for Stark County.

ROBERT K. McDOWELL v. THORA KATHRYN LARSON.

Decided, February Term, 1914.

Master and Servant—Relation Held to Exist Although Work Had Not Begun—Plaintiff Relieved of Negligence by Action of Defendant's Agent.

A young woman was sent for to take a place in a laundry and begin work at once. She donned her working clothes and accompanied the messenger back to the laundry. They entered the premises through the engine room, where the young woman stepped into a sunken barrel filled with boiling water, which was uncovered and of the existence of which she had no knowledge. The proprietor of the laundry provided medical attendance for her and after her recovery took her back into his employ. *Held:*

1914.]

Stark County.

1. That the relation of master and servant existed and she was not a trespasser.
2. That the verdict of the jury in her favor was not inconsistent with their answer of "yes" to interrogatory as to whether a safe and convenient entrance was furnished employees of the laundry.
3. That the burden of proof as to the circumstances existing at the time of her injury was upon the plaintiff below, and the jury having found in her favor, judgment should not be disturbed.

Bow, Amerman & Mills, for plaintiff in error.

J. A. Jeffers and J. W. Craine, contra.

SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.

This is a proceeding in error brought to reverse the judgment of the court of common pleas, rendered in an action brought by Thora Kathryn Larson, defendant in error, plaintiff below, for personal injuries caused as she claims by the negligence of the plaintiff in error, defendant below.

In her amended petition filed in the court below the plaintiff alleged, in substance, that on the 19th day of December, 1912, she was employed by the defendant as an operative in his laundry in the city of Canton, Ohio, and after entering said laundry for the purpose of beginning her duties therein and while in the course of her employment she was passing over a brick walk intended for the use of the employees of the defendant in said laundry, and when at a point near the boiler room thereof she stepped with her left foot and leg into an uncovered barrel filled with boiling water, which said barrel was sunken into the earth at said point in said walk so that the top thereof was practically even with the surface of said walk. She further alleged that in so doing she was seriously and permanently injured as is more particularly described in said petition. That at the time of the happening of said accident she did not know of the existence of said barrel of water in said walk, and that said accident occurred by reason of the carelessness and negligence of the defendant in not having said walk properly lighted where said barrel was located, and not having a suitable covering over the top thereof, and in placing said barrel in said

walk at the place and in the manner described and in failing to notify the plaintiff of the existence of said barrel.

It is further alleged that at said time the defendant employed five or more workmen, or operatives, regularly in his said laundry business, and that he had not at said time paid into the state insurance fund the premiums provided for in what is known as the employers' liability act, passed by the Legislature of Ohio, May 1, 1911, and found in Ohio Laws, Vol. 102, pages 522 to 533 inclusive.

The plaintiff averred that by reason of said injuries so received she suffered loss of wages in the sum of \$56, and that in the future she will be unable to earn more than half what she would have been able to earn but for said injuries; all to her damage in the sum of ten thousand dollars, for which she prays judgment.

To this amended petition the defendant filed an amended answer, admitting that the plaintiff, on the 19th day of December, 1912, stepped into a barrel of heated water in the boiler room of his place of business known as the Columbia Laundry, and that as a result thereof she sustained some injuries, but denies that she was injured to the extent claimed by her in her said amended petition. He further avers in said amended answer that at the time when plaintiff stepped into said barrel of hot water she was not in his employment in his said laundry, and had no right whatever to be in said engine or boiler room where said barrel of water was located, and avers the fact to be that said plaintiff was a trespasser at said time and whatever injuries she sustained were caused by her carelessness and negligence in coming into said boiler room and in stepping into said barrel of water after she had been warned of the existence and presence of said barrel of water.

The defendant denies that the act passed by the Legislature of Ohio, May 31, 1911, known as the employers' liability act, was in force and effect at the time when the plaintiff received her said injuries, and that he is entitled to all of the defenses he had previous to the passage of said act. The defendant denies

1914.]

Stark County.

all the other allegations in said amended petition not expressly admitted to be true.

Upon the issues thus made by the foregoing pleadings, said cause was submitted to a jury, resulting in a verdict in favor of the plaintiff for the sum of \$800. A motion for a new trial having been overruled, judgment was entered on said verdict. A bill of exceptions was taken, containing all the evidence offered upon the trial, including the charge of the trial court, and said cause was brought before this court upon a petition in error for review and for the reversal of said judgment of said court of common pleas.

Said petition in error contains numerous grounds of error alleged for the reversal of said judgment, and while not waiving any, counsel for plaintiff in error specially urged upon this court the following grounds of error:

1st. That the court below erred in overruling the motion of plaintiff in error for a judgment in his favor notwithstanding the verdict of the jury.

2d. That said court erred in overruling the motion of the plaintiff in error to arrest said cause from the jury and direct a verdict in favor of the plaintiff in error at the conclusion of plaintiff's case and at the conclusion of the entire case.

3d. That said court erred in its refusal to give certain requests made by the plaintiff in error in its charge to the jury, and in giving certain requests on the part of the plaintiff in error in its charge to the jury.

4th. That said court erred in its charge to the jury.

5th. That the verdict of the jury is against the manifest weight of the evidence and is contrary to law.

Was the general verdict inconsistent with the special findings? It appears that the defendant moved for judgment in his favor upon the special findings of the jury, notwithstanding the general verdict, which motion was overruled by the court, and this action of said court is the first assignment of error complained of.

The interrogatories submitted by the defendant below to be answered by the jury, and which were answered, were the following:

"No. 1. Question: Did the defendant furnish to his employees a reasonably safe and convenient way of entering his laundry?" Answer: "Yes."

"No. 2. Question: If you answer the above interrogatory in the affirmative, then was plaintiff pursuing the way so furnished when she met with the injury complained of?" Answer: "No, the agent did not take her that way."

"No. 3. Question: Was plaintiff an employee of defendant at the time of the injury?" Answer: "Yes."

"No. 4. Question: If you answer the interrogatory last above in the affirmative, then was she engaged in the due course of her employment when injured?" Answer: "Yes."

"No. 5. Question: If you answer the last above interrogatory in the affirmative, then what employment was she engaged in when so injured?" Answer: "She was answering their call."

Section 11464 of the General Code, provides that:

"When a special finding of facts is inconsistent with the general verdict, the former will control the latter and the court may give judgment accordingly."

It is claimed that the foregoing special findings of the jury are not consistent with the general verdict, and that therefore the court below erred in overruling the defendant's motion for a verdict in his favor. The evidence in this case shows that the employees in said laundry entered therein in more than one way; hence the answer by the jury to the interrogatory submitted would not necessarily mean that the entrance to said laundry through the boiler room was a reasonably safe and convenient way.

In *David v. Turner*, 69 O. S., 101, it is held:

"To be inconsistent with the general verdict, as contemplated by Section 5202, Revised Statutes, it must appear that the special findings are irreconcilable in a legal sense with the general verdict; and to justify the court in setting aside or disregarding the general verdict on the ground that it is inconsistent with

1914.]

Stark County.

such special findings, the conflict must be clear and irreconcilable."

Are the special findings disclosed in this record inconsistent with the general verdict under the rule laid down in the foregoing case? We can not say that they are, and for this reason the contention of the plaintiff in error in this respect is not sustained.

It is argued that the court below erred in overruling the motion of the plaintiff in error at the conclusion of plaintiff's case, and renewed and overruled at the conclusion of the entire case, to arrest said cause from the jury, and direct a verdict in favor of the plaintiff in error. In view of the argument made by counsel for the plaintiff in error to this court, said motion was undoubtedly based upon the theory that the defendant in error was not in the employ of the plaintiff in error at the time she was injured; or to state it in legal phrase, the relation of master and servant did not then exist. That she was injured in the boiler room of the laundry, at the time, in the manner and to the extent alleged in her petition, is fully borne out by the evidence; but the plaintiff in error claimed that she was not in his employ and that she was a trespasser in said boiler room at said time; that her injuries were due to her own carelessness and negligence, and that he is, therefore, in nowise liable for her injuries. Was she a trespasser?

It appears that one of the girls in the employ of the plaintiff in error left his service the morning of the accident, and this fact having come to the knowledge of William Larson, a brother of the defendant in error, who was then employed in said laundry, he at once applied to the wife of the plaintiff in error, who was authorized to and did employ laundry help, for a position for his sister, the defendant in error, as shown by the following testimony of said William Larson, on page 10 of the bill of exceptions:

"Question: And what was said between you and Mrs. McDowell relative to the employment of your sister, if anything?

"Objection. Overruled. Exception.

"Answer. There was a girl quit that morning and I went up and asked Mrs. McDowell if she'd give my sister a job now. Mrs. McDowell said 'Yes; when will she come in?' 'Monday morning.' She said: 'No, go and bring her up right away to go to work;' which I did."

Carrying out Mrs. McDowell's instructions, it appears that the witness, William Larson, at once went to the home of the defendant in error and reported to her what Mrs. McDowell had said, and after changing her apparel, or, stating it in the language of the defendant in error, "I put on working clothes, so I could start to work as soon as I got there," she then accompanied her brother to the laundry, going in a rear entrance, as the evidence showed, on a brick walk, used by the employees in going to said laundry, and stepping into an uncovered barrel of hot water received her said injuries. Under these circumstances, was she a trespasser? The jury undoubtedly found that she was not, and in our judgment they were justified in so finding, for her conduct showed that she had accepted the position tendered her by the wife of the plaintiff in error through the latter's delegated agent, William Larson, who it appears was conducting her to the place of her employment at the time she received her said injuries. The plaintiff in error contends that the defendant in error wrongfully entered said boiler room, but the jury undoubtedly found, and we think properly, that she was in charge of and under the direction of the agent of the plaintiff in error.

But it is further contended by the plaintiff in error that the defendant in error was not in his employ at the time the latter received her injuries. Employment is one of contract, express or implied. If the jury found that the defendant in error accepted the proposition made to her by an agent of the plaintiff in error to enter the latter's employment and prepared to enter upon said employment, and at the time when she received her said injuries she was upon the premises of the plaintiff in error, and without fault or negligence on her part she was then and there injured as alleged in her said amended petition, then the jury, under the instructions given by the court below, were warranted

1914.]

Stark County.

in finding that the relation of master and servant did then exist between the plaintiff in error and the defendant in error, and that the plaintiff in error owed to the defendant in error the duty of exercising ordinary care in protecting her from danger and injury while in and upon his premises. She was then subject to his order and direction under the contract for hire already made, and if she was then injured through the carelessness and negligence of the plaintiff in error, and without fault on her part, the plaintiff in error would be liable for such injuries.

Before leaving this feature of the case, let us inquire how the plaintiff in error regarded the alleged employment of the defendant in error. What was his conduct as shown by the evidence as to how he considered the defendant in error, whether as an employee or otherwise? When the defendant in error was injured he procured medical attention and aid for her and continued to furnish such attention and aid during her entire illness and disability, and paid for it; and when she recovered so as to be able to resume work, she was taken back into his employment without any further or renewed contract, and placed upon the payroll of his laundry employees. We think this circumstance furnishes its own comment. So we think that the court below, in overruling the motion of the plaintiff below at the close of the plaintiff's case, and renewed at the close of the entire case, to arrest the testimony from the jury and direct a verdict for the defendant below, did not err.

But the existence of the relation of master and servant would not alone authorize a recovery by the defendant in error. The burden was upon her to show the existence of the conditions stated in her amended petition, and that by reason of these conditions she was injured. These were questions of fact which the jury alone were called upon to solve.

Among the assignments of error in said petition in error is that the court below erred in refusing to give certain requests by the defendant below in his charge to the jury, and that said court erred in giving certain requests on the part of the plaintiff below in its charge to the jury. An examination of the record shows

that three requests in writing were submitted by the defendant below, before argument, to be given by said court to the jury, and that they were so given verbatim, and that no other requests, in writing or otherwise, were submitted by said defendant during the trial of said case. Of the requests in writing submitted by the plaintiff below to be given by said court to the jury, before argument, we think that those which were given are not open to the objection made.

It is also argued by the plaintiff in error that the court below erred in its charge to the jury. We have examined said charge and we not only think that it was exhaustive in its treatment of all the different and many phases of the law arising out of the issues and evidence in the case, but that it correctly states the law in reference thereto. . It is not too much to say that said charge is an able and thorough exposition of the law as applied to this case. If further or more explicit instructions were desired by the plaintiff in error, they were not requested.

It is also contended by the plaintiff in error that the verdict in this case is manifestly against the weight of the evidence and contrary to law. We have already expressed an opinion as to the effect of the evidence bearing upon certain branches of this case, and as to the remaining facts it is sufficient to say that it was the province of the jury to pass upon them, and having passed upon them we see no good reason as a reviewing court to disturb their finding. It is the judgment of this court, therefore, that said verdict is not against the manifest weight of the evidence, nor is the same contrary to law.

We have also examined the bill of exceptions in reference to the other assignments of error set out in said petition in error, and we find no error prejudicial to the legal rights of the plaintiff in error in the record as to justify a reversal of the judgment of the court below.

The judgment of the court of common pleas will, therefore, be affirmed, at the costs of the plaintiff in error.

1914.]

Summit County.

WHAT CONSTITUTES REJECTION OF A CLAIM BY AN ADMINISTRATOR.

Circuit Court of Summit County.

THE BRONSON-KALAMAZOO PORTLAND CEMENT COMPANY ET AL V.
THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE, OHIO.

Decided, April 12, 1912.

Administrator—Rejection of Claim—Delay in Bringing Suit, While Claim Was Under Consideration—Notice of Dishonor of Decedent's Note.

1. To constitute a rejection of a claim by an administrator there must be something said or done by him which shows clearly that he does not intend to pay the claim; merely saying that he does not want to pay the claim and requesting that others jointly liable with his decedent on the claim be made to pay it, is not sufficient.
2. Delay in bringing suit on a claim against an estate during which delay the administrator has not refused to allow the claim, is no defense to an action thereon against an estate, though meanwhile others jointly liable with the estate on the claim have become insolvent.
3. Notice of dishonor of a note endorsed by one who died before maturity of the note, should be given to the administrator of such deceased endorser, and if notice sufficient to identify the note is so given to the administrator it will be held good though the notice says the note was "endorsed by you," instead of "endorsed by your decedent."

Musser, Kimber & Huffman, for plaintiff in error.

G. H. Eichelberger and *S. D. Kenfield*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties in interest in this proceeding are Harvey Musser, as administrator of the estate of Henry Robinson, deceased, who is the real plaintiff in error, and the Second National Bank of St. Clairsville, which is the defendant in error. In this opinion they will be spoken of as "the administrator" and "the bank" respectively.

The bank brought suit against the Bronson-Kalamazoo Portland Cement Co., a corporation, hereinafter spoken of as "the

cement company," John F. Townsend and the administrator on a promissory note, which reads:

"\$5,000.00.

AKRON, OHIO, August 30th, 1906.

"Four months after date we, or either of us, promise to pay to the order of J. F. Townsend & Henry Robinson five thousand & 00/100 dollars payable at the Second National Bank of Akron, Ohio. Value received, with interest at 8 per cent. after maturity.

"No. 271.

THE BRONSON-KALAMAZOO PORTLAND
CEMENT Co.,

"Due Dec. 30, 1906.

"By W. E. WHEELER,
"Secretary."

(Indorsements.)

"J. F. TOWNSEND,

"HENRY ROBINSON."

(Credits on said note.)

"March 21, 1909, paid \$1,000.

"June 29, 1909, paid \$600."

The petition properly alleges the appointment and qualification of the administrator; that the note was made by the cement company, which is a corporation, the indorsement of said note by Robinson and Townsend, and that it was delivered to the bank by the endorsers, whereby the bank became the holder of the same in due course; that the note was presented for payment on the day it became due, at the Second National Bank of Akron, where, by its terms, it was to be paid; that payment was refused; that the note was duly protested for non-payment, and due notice thereof given to Townsend and to the administrator; that nothing has been paid on the note except as shown by the indorsements thereon; that on the 7th day of February, 1907, the bank presented the note to the administrator for allowance as a claim against the estate of Robinson, and that the same was then allowed as a valid claim against said estate; that thereafter on or about the 7th day of August, 1909, said administrator rejected said claim.

The suit below was brought on the 8th day of October, 1909. No service was made on Townsend or on the cement company. Proper service was made on the administrator, and he answered admitting his appointment and qualification as administrator, and that on August 7th, 1909, he rejected said note as a claim

1914.]

Summit County.

against the estate, and he avers that he rejected said claim long before said last-named date, and that much more than six months before suit was brought he notified the bank that he refused to allow the same as a valid claim against said estate, and, so he says, the statute of limitations bars the bank from maintaining its suit.

He further says that the cement company and its alleged officers and agents attempted to make and deliver the said note without any authority to do so; that the note was and is without any consideration whatever and constitutes no valid obligation against any of the parties sued; that all of said facts were well known to the bank.

He further says that the bank knew, at the time said note became due, that Robinson received no part of any consideration for said note, if any consideration was paid to anybody, and that the bank knew that Robinson was but an accommodation indorser on the same, and that by reason of its long delay to pursue its claim against the principal debtors on said note, after it had been notified to do so, it can not now maintain its suit against him.

He further says that the bank, by accepting payments of interest and a part of the principal on said note after it became due, extended the time of payment of the same, whereby he is released from liability thereon.

To this answer the bank replied, denying all parts thereof except in so far as it admitted the allegations of the petition.

The case was tried to a jury, resulting in a verdict for the bank. The administrator filed a motion for a new trial, which was overruled and judgment entered on the verdict, to which the administrator duly excepted, and by proper proceedings the case is here for review upon petition in error filed by the administrator.

On behalf of the administrator it is urged that the verdict is contrary to and not supported by the evidence.

The facts disclosed by the evidence are that J. F. Townsend was largely interested in the cement company and that Robinson was also interested in the same company; that this company borrowed money from various parties, one of which was the Sec-

ond National Bank of St. Clairsville; that there was a custom for notes to be prepared made payable to J. F. Townsend and Henry Robinson, as this was; these notes were indorsed by Townsend and Robinson and left in the hands of Lorenzo D. Brown, who was then assistant cashier of the Second National Bank of Akron, and was authorized by both Townsend and Robinson to fill in dates and amounts, have the note signed by the cement company, and use them for borrowing money for the company, or as renewals of notes already outstanding against the company.

The note sued on in this action was one of such notes; it was indorsed by both Townsend and Robinson; it was probably not signed by the secretary of the company until after the indorsement, although the evidence is not clear on that point. Mr. Brown leaves it entirely uncertain, not from any apparent unwillingness on his part, but because counsel on neither side put questions, the answers to which might have made it clear; the note was not dated, nor was the amount probably written in when the indorsements were made. It was, however, subsequently dated, the amount, \$5,000, written in, and if it had not already been signed by the secretary of the cement company, it was then signed by him and left with Brown, who at once forwarded it by mail to the bank at St. Clairsville, which bank either remitted a draft for the avails, or used it in renewal of a former note of the same kind. There is a little confusion about this, but in any event, it took the place of a former note of the same parties, whether drafts were sent each way or not. At its maturity it was presented for payment at the proper place by a notary public; payment was refused, the notary protested it for non-payment, sending notices by mail to Townsend and other indorsers, and sending a notice to the administrator in these words:

“NOTICE OF PROTEST.

“AKRON, O., December 31, 1906.

“Take notice that a promissory note for five thousand dollars, dated Akron, Ohio, August 30, 1906, payable Four Months after date, at Second National Bank, Akron, Ohio, signed by the Bronson-Kalamazoo Portland Cement Co., payable to J. F. Townsend and Henry Robinson, endorsed by you, was this day presented

1914.]

Summit County.

for payment, which was refused, and the same was therefore this day protested by the undersigned notary public for non-payment. The holder therefore looks to you for payment thereof together with interest, costs, damages, etc., you being the indorser thereof.

“FRANCIS SEIBERLING,
“Notary Public.

“To HARVEY MUSSEY, *Admr.*,
“*Estate of Henry Robinson, Dec'd.*”

The note was afterwards presented to the administrator for allowance, and on the 7th day of February, 1907, he mailed a letter to the bank notifying it that he allowed the claim. Later the administrator and the bank had correspondence back and forth about the claim, in which the administrator urged the bank to get pay from the cement company and Townsend, if possible, and on the part of the administrator it is claimed that the letters written by him to the bank constitute a rejection of the claim. He says, too, that he had a talk with Mr. Slabaugh or Mr. Seiberling, of the firm of Slabaugh, Seiberling & Huber, who represented the bank, in July, 1908, in which he says that he said to Mr. Slabaugh or Mr. Seiberling (he says that he thinks the conversation was with Mr. Slabaugh), he gave notice that this claim was rejected. He says what he said to Mr. Slabaugh (if it was Mr. Slabaugh, and if not, to Mr. Seiberling) was:

“They wanted this note paid. I said that it was a debt of the Bronson-Kalamazoo Company and John F. Townsend, and that they were abundantly able to pay. J. F. Townsend had security from the new corporation, the Chanute Cement & Clay Product Company, bonds, and that I should insist upon Townsend and the Kalamazoo Company paying the note.”

Then follows this question:

“Didn't you say to him you wanted him to try and get the money out of the Bronson Portland Cement Company and Townsend if he could?”

To this he answered:

“Yes, I told him he could; I said the money was passing through the hands of his bank, the Second National Bank, and they could. They were selling bonds right along, as I under-

stood, and he could get the pay, insist upon Mr. Brown and Mr. Brunner, perhaps, who was the treasurer of the company at that time, paying the note; I so wrote Townsend a day or two before.

"Q. You told him, did you not, you did not want to pay this note unless you had to? A. Well, I can't say I told him those exact words.

"Q. That was the substance of it, wasn't it? A. I think I repeated what I said; I said I didn't propose to pay this note because the company and Townsend were good and could collect out of Townsend and the company and in any event we were simply sureties on the note for Townsend.

"Q. You said you were surety on the note for Townsend? A. Yes."

We think this is very far from constituting a rejection of the claim by the administrator. Mr. Slabaugh says that he had no conversation with Mr. Musser on the subject, and Mr. Musser says it may be that the conversation was with Mr. Seiberling. Mr. Seiberling's recollection of the conversation is different from that of Mr. Musser, but if the recollection of Mr. Musser is correct, still it failed to constitute a rejection of the claim. On the contrary, it seems to recognize the liability of the administrator, but to insist that as Robinson was only a surety, the fair thing for the bank to do would be to get the money out of the principal debtor, which he said he supposed they could do. This was practically in accord with what Mr. Musser wrote to the bank on the 15th of October, 1907. In that letter he said:

"This note, as I believe I wrote you upon a former occasion, is primarily a note of the cement company, secondarily that of Mr. Townsend, and lastly the debt of Mr. Henry Robinson, the latter being purely an accommodation indorser. You will readily see that as long as the cement company and Mr. Townsend are able to pay this note, it is entirely natural that I should insist upon the obligation being liquidated by the persons directly and primarily liable."

On the 23d of May, 1908, Mr. Musser wrote the bank, saying:

"Messrs. Slabaugh, Seiberling & Huber asked me to write to you consenting to the payment, on my part, of the interest for a long time unpaid upon your \$5,000 note against the Bronson-Kalamazoo Portland Cement Company and J. F. Townsend, and

1914.]

Summit County.

upon which Mr. Henry Robinson is surety. I cheerfully write this letter, and assure you that I not only consent, but it is my wish that the interest should be paid and that you should take it and make the necessary indorsement upon the note. I believe that if given a chance Mr. Townsend will be able to dispose of all the bonds of the Chanute Cement & Clay Product Company, or at least enough thereof to pay all of its debts, including your note, and to complete the plans now in process of construction.

"I trust the foregoing will be satisfactory, and that you may receive a prompt remittance of this long unpaid interest."

It seems clear that until Mr. Musser finally rejected this claim on the 7th day of August, 1909, nothing had been said by him either orally or in writing which could fairly be construed by the bank as a notice that the claim was rejected. On the contrary, it is all consistent with the position which he took at the outset, that the estate of Robinson was liable upon this claim, but that in fairness to the estate, every effort should be made first to obtain payment from the cement company and Townsend; and this disposes of the complaint made as to the charge of the court as found at pages 115 and 116 of the bill, where the court uses this language:

"What is a rejection of a claim? Claims are presented to administrators, executors and assignees very often, and the administrator, executor or assignee may take the matter under advisement, may give some conditional affirmance or rejection, but leave the matter open for further consideration. That would not be a rejection, nor would it be an allowance of the claim. The matter would be simply held under advisement until all the facts and circumstances upon which action ought to be based could be ascertained, and then final action come later, so that the rejection of a claim means the final, absolute, unequivocal disallowance or rejection, refusal to pay it, refusal to recognize it as a just claim against the estate, and that, as the court has said, must be a finality without conditions or restraint, or without any disposition to consider the matter further as final action of the parties. If there was such rejection, the jury will determine the date of that rejection, and then it would be incumbent upon the plaintiff to bring his suit within six months thereafter. The burden of proof that the suit was brought at that time would be upon the plaintiff."

Whether this language is stronger than it should have been, it was not prejudicial to the administrator. The court would have

been entirely justified in saying to the jury as a matter of law, that there was no rejection of this claim by the administrator until the final rejection which is conceded by the bank, and which was less than six months before the suit was brought.

But, was the bank a holder in due course in such wise that it was entitled to recover without reference to the way in which the note was made? It is provided by General Code, Section 8157:

“One is a holder in due course who has taken the instrument under the following conditions: first, that it is complete and regular upon its face. Second, that he became the holder of it before it was overdue, and without notice that it had previously been dishonored, if such was the fact.”

There is no claim here that this note had ever been dishonored before it was received by the bank, and it was certainly received before it was overdue.

“Third, That he took it, in good faith and for value.”

In this case, as already pointed out, the bank took this note in renewal of a former indebtedness of the maker to the bank, or had remitted a draft for the avails of the note, having received payment of the note which preceded this one, and of which practically this was taken in renewal.

“Fourth. That at the time it was negotiated to him he had not notice of any infirmity in the instrument or defect in the title of the person negotiating it.”

Certainly there is nothing in the evidence in this case to indicate that the bank had any notice of any infirmity, if there was any such, in this note before it took it. So we hold that under the evidence, the bank was a holder of the note in due course.

By Section 8119 of the General Code it is provided as to negotiable paper in these words:

“When the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instru-

1914.]

Summit County.

ment operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that such an instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if such an instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

From the evidence in this case, we think this note, which was not completed when it was indorsed by Townsend and Robinson, was filled out by Brown, their agent, in exact accordance with the authority which they gave to him when they placed the instrument in his hands, but in any event, it was negotiated to a holder in due course, and, therefore, was valid and effectual for all purposes in its hands.

Attention has already been called to the fact that it is not clear from the evidence whether this signature of the secretary of the cement company was placed upon the note before or after the names of the indorsers were written thereon, but as we understand the law, this is indifferent. Section 8171, General Code, provides:

"Every indorser who indorses without qualification, warrants, to all subsequent holders in due course: the matters and things mentioned in paragraphs Nos. 1, 2 and 3 of the next preceding section."

These provisions, which have already been read, are:

"1. That the instrument is genuine and in all respects what it purports to be; that he has a good title to it, and that all prior parties had capacity to contract; and then, further quoting from Section 8171:

"That the instrument is at the time of his indorsement valid and subsisting."

This section of the statute sufficiently established the ownership of this note and the right to sue upon it in the bank.

What we have said as to what constitutes a rejection of the claim by the administrator, we think is supported by Sections

559 and 560 of Rockel, and the authorities cited by him. It is possible that the rejection need not be as emphatic as the court said in its charge it must be, but there must be something done by the administrator to show that he does not intend to pay the claim at all, not simply that he does not want to pay it and urging that it be paid by somebody else, and that really is all there is in the evidence to show a rejection of this claim, except what Mr. Musser says as to his conversation with Mr. Eichelberger in 1908, when Mr. Eichelberger asked him if he was not mistaken as to the date, and whether he ever had a conversation with his firm until some time in 1909, that that would not be his recollection. It is clear from this that Mr. Musser did not intend to have it understood that he was certain that this occurred in 1908, and in view of the letters that he wrote after that, we think it clear that he was mistaken as to this date, and that, therefore, as already said, the court would have been justified in saying to the jury that the claim was not rejected prior to the time when it was admitted by the bank that it was rejected.

It is urged that the administrator should be relieved in this case because of the delay on the part of the bank in bringing suit against the other parties. We know of no law that would sustain this position. It is manifest that the bank hoped to obtain payment from the cement company and Mr. Townsend; that the administrator was anxious that it should do so, and expressed such anxiety to the bank. Both parties hoped to avoid litigation as between themselves. Nobody, certainly not the administrator, suffered by reason of this delay, and the bank promptly brought this suit when the claim was rejected. The position of the administrator in this regard is not sound.

There remains a question in connection with the facts which is not discussed in the brief of the plaintiff in error, but which has been considered by the court with care, and that is the sufficiency of the notice of dishonor, given by the notary who protested the note for non-payment, to the administrator. It will be observed that this notice reads "that the note protested was given for \$5,000, dated August 30th, 1906, payable four months after date at Second National Bank, Akron, O., signed by the Bron-

1914.]

Summit County.

son-Kalamazoo Portland Cement Co., payable to John F. Townsend and Henry Robinson, endorsed by you." This is the language of the notice sent to Harvey Musser, administrator of the estate of Henry Robinson, deceased. If the notary, instead of using the printed form which he had before him, had said "Endorsed by Henry Robinson, now deceased," we should have been relieved of the question which has somewhat perplexed us. Might the administrator simply ignore that notice and say, "I have never indorsed any such note, either personally or as administrator," or was he bound to understand that what was meant was "Indorsed by your decedent?" The court said nothing of this matter in its charge to the jury until attention was called to it by counsel for the administrator, when the court said:

"The notice will be before you as evidence of what that notice was. The court will say to you that in making and presenting this note (which clearly means 'notice') it is not necessary for the party presenting the note (notice) to use any formal words or expressions in serving the notice that the note was dishonored; that is, not paid when due by the cement company, but it must appear that Mr. Musser's attention was directed to this particular note and that Mr. Henry Robinson was claimed by the plaintiff bank to be liable on that note and his attention must have been challenged to it, but it was unnecessary in notifying Mr. Musser, if he were the administrator, and it is admitted that he was, that he was notified of that fact in the capacity or in the relation of administrator of that estate. Such formality and particularity as that would not be required if notice in fact was given to Mr. Musser as to this particular note in sufficient terms to identify the note."

The last statement in this part of the charge seems to be justified by Section 8200 of the General Code, which reads:

"A written notice need not be signed, and insufficient written notice may be supplemented and validated by verbal communication. A mis-description of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby."

Section 8201 provides:

"The notice may be given in terms which sufficiently identify the instrument and indicate that it has been dishonored by non-

acceptance or non-payment. In all cases it may be given by delivering it personally or through the mails."

This is borne out by the case of *Townsend v. Bank*, 2 O. S. R., 345. In the opinion, at page 361, this language is used:

"Information of the dishonor is as explicit a condition of his contract (the indorser's) as presentment to the maker or acceptor, and often quite as important to him; and it can no more become absolute and be made liable by neglecting the one than the other. He has contracted to know, and has a right to know, that the paper has been presented to the party primarily liable for payment, and been refused; and a right to demand that the information shall be so definitely given as to enable him to fix the liability, and upon taking it up, to coerce payment from those back of him on it; which can only be done when he is advised that demand was made at the time when the maker or acceptor was bound to pay, and when a failure to do so would dishonor the paper.

"This information need be given in no set form of words. Neither technicality nor formality belongs to the subject. The language used is good, not only for what it positively expresses, but also for what it fairly implies. Nor does the rule, as now settled, in the least infringe upon the doctrine laid down in numerous cases, that immaterial variances or mistakes in the description of the instrument, or other particulars not calculated to mislead the indorser, and which may be corrected by the facts within his own knowledge, will not vitiate the notice."

To the same effect are the cases of *Powell v. Bank*, 12 O. D. Reprint, 615, and other cases cited in the 2d Encyclopedic Digest, at page 753.

Daniel on Negotiable Instruments, 2d Vol., Section 973, says:

"As to the form of the notice, no particular phrase or form is necessary. The object of it is to inform the party to whom it is sent, first, that the bill or note has been presented; second, that it has been dishonored by non-acceptance or non-payment, and third, that the holder considers him liable and looks to him for payment.

"In order that a notice should answer these conditions, and duly intimate dishonor to the drawer or indorser, it should therefore, either expressly or by just and natural implication, comprise the following elements: (1) A sufficient description of the bill or note to ascertain its identity. (2). That it has been

1914.]

Summit County.

duly presented for acceptance or payment to the drawee, acceptor or maker. (3) That it has been dishonored by non-acceptance or non-payment. (4) That the holder looks to the party notified for payment."

Section 974 reads:

"The notice should describe the bill or note in unmistakable terms; should state where the note is, that the party notified may find it; should state who the holder is and who gives the notice, or at whose request it is given. Such, at least in theory, are the requisites of a proper notice, and a good business man should never neglect to comply with them. But the courts are not strict in requiring this thorough description of the dishonored instrument, and the requirements of the law are considered as satisfied by any description which, under all the circumstances of the case, so designates the bill or note as to leave no doubt in the mind of the party, as a reasonable man, what bill or note was intended."

From these authorities and other citations made in these authorities, we reach the conclusion that no prejudice came to the administrator by the charge of the court in this regard, and indeed, we think the court might, as pointed out in the case of *Townsend v. Bank*, *supra*, have said to the jury that this notice being addressed to Mr. Musser as administrator of the estate of Henry Robinson, deceased, although it used the words "indorsed by you," was a sufficient notice to him that the note referred to was one indorsed by Henry Robinson. This is especially true in view of the fact that as administrator Mr. Musser would have had no authority to indorse any note at all, and, therefore, he must have understood that this meant a note indorsed by Henry Robinson.

The complaint is further made in this case that the court erred in admitting evidence that other notes of a similar character had been presented to Mr. Musser. The administrator had himself brought out, through the witness Brown, that there was a large number of these notes placed with various banks and others by Brown, acting for the cement company. Of course, evidence that the administrator had paid other notes of this kind could not be admitted as tending to show that he

ought to pay this one. This is forcibly pointed out in the case of *Griffith v. Beecher*, 10 Barb., 432, from the opinion in which the brief of counsel for the administrator has quoted. The evidence admitted over the objection of counsel for the administrator was practically the same as was brought out by the administrator through the witness Brown, and possibly was admissible as tending to show that the administrator knew from the notice which he received from the notary that what was meant by the words "indorsed by you" was "indorsed by your decedent."

This case is not without difficulties, but we have, as we think, carefully considered each of the questions arising in this proceeding in error, and we reach the conclusion that no error was committed to the prejudice of the administrator, that substantial justice was done and the judgment is affirmed.

DELAY AND FAULTY EXECUTION ON THE PART OF A BUILDING CONTRACTOR.

Circuit Court of Summit County.

F. E. SMITH & SON V. JOHN F. HEMINGTON ET AL.

Decided, April 12, 1912.

Building Contract—Breach of—Damages for Inconvenience.

Where the natural and direct result of the failure of the party to a building contract, who has undertaken to erect a building for another, to perform his contract, is to cause the latter to suffer inconvenience in the use and occupancy of such building, or where such result must have been contemplated by the parties to the contract as a probable consequence of its breach, compensation for such inconvenience may be awarded.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The order of the parties to this proceeding in error is the same as in the court of common pleas. The action below was brought to recover the balance claimed to be due the plaintiffs from the defendant, John F. Hemington, under a certain contract, and

1914.]

Summit County.

modifications thereof and additions thereto, for the construction of two dwelling-houses, and to foreclose a mechanic's lien. The amount for which personal judgment was sought against said defendant was \$199, with interest from October 10, 1910.

The defendant, John F. Hemington, filed a counter-claim in the action, based upon the alleged failure of the plaintiffs to construct the houses in the manner specified in the contract, and charging the use of defective material, and the doing of faulty work in numerous particulars in the construction of said houses. The amount of the counter-claim asserted was \$400, \$200 for each of the houses.

The jury returned a verdict for said defendant in the sum of \$201, from which the court of common pleas ordered \$13.35 remitted. Said defendant having remitted this amount, the plaintiff's motion for a new trial was overruled, and judgment entered against the plaintiffs in said defendant's behalf for \$187.65.

The plaintiffs in error seek a reversal of this judgment on two grounds:

1. That the court erred in charging the jury; and
2. That the damages are excessive.

The trial court, after instructing the jury that in estimating the damage to said defendant by reason of the failure of the plaintiffs to build the houses in accordance with the agreement between the parties they had a right to take into consideration how much it was fairly and reasonably worth to place the houses in the condition they would have been in had the contract been kept, used this language:

"You have a right also to take into consideration the inconvenience to the defendants, if any there would be, because of the failure of the plaintiffs to build according to their contract."

It is contended on behalf of the plaintiffs in error that there was no evidence offered on the subject of any inconvenience arising out of the failure to construct the houses according to agreement, and that it was, therefore, error to instruct the jury that they might consider such inconvenience in assessing the damages.

There was, however, evidence showing the condition of the houses, and the work necessary to be done to correct the defective workmanship employed on the houses, and to remedy conditions due to inferior material used in their construction. It would follow as a matter of necessity from this evidence, that inconvenience would result. No evidence was offered, it is true, as to the value of such inconvenience. It is doubtful if such evidence would be competent. The jury were as capable of determining the amount to be allowed for inconvenience, when the facts were before them, as any witness would.

We think the court committed no error in giving that portion of the charge above quoted, and that it is consistent with the principle laid down in *Goldsmith v. Hand*, 26 O. S., 99, where the measure of recovery under a building contract, which had been substantially but not strictly complied with, was under discussion. In the opinion, on page 106 it is said:

“We think that where parties have dealt with each other as these parties respectively had in reference to the contract and the mode of its performance, and the owner of the lot has chosen to go into occupancy and use of the building erected upon it, thereby appropriating to himself the fruits of the contract, he ought to, on the plainest principles of justice, pay for them as the contract price, less such sums for delay, defective work or inferior materials, etc., as the owner is in equity entitled to have deducted.”

It will be noticed that the court in that case did not attempt to enumerate all of the items of damage which might properly be taken into account in determining the amount to be set off against the contract price, but merely indicated the general character of such items.

Where the natural and direct result of the failure of the party to a building contract, who has undertaken to erect a building or buildings for another to perform his contract, is to cause the latter to suffer inconvenience in the use and occupancy thereof, or where such a result must have been contemplated by the parties to the contract as a probable consequence of its breach, we think that compensation for such inconvenience may be awarded.

1914.]

Summit County.

The law of damages for breach of contract is practically founded on the case of *Hadley v. Baxendale*, 9 Ex. Rep., 341. It was held there:

“Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties as the probable result of the breach of it.”

The instruction given by the trial court was, in our opinion, within the spirit of this well recognized principle.

The other contention of the plaintiffs in error, that the damages awarded the defendant, John F. Hemington, are excessive, is based upon the assumption that the jury could consider only the cost of placing the houses in question in the condition they would have been in had the plaintiffs performed their contract strictly according to its terms, and that the evidence does not show such cost to have been as great as the amount of damages allowed by the jury. We have, however, indicated our approval of that portion of the charge which authorized the jury to consider also, as an element of damage, the inconvenience suffered by said defendant by reason of the condition of the houses.

In view of the estimates given by various witnesses of the cost of placing the houses in condition to conform to the requirements of the contract, and in view, also, of the fact that something might properly be allowed for said defendants' inconvenience in accordance with the instruction of the court, we are unable to say that the verdict was excessive.

The judgment of the court of common pleas is affirmed.

**PROCEEDINGS FOR RECOVERY OF CONCEALED PROPERTY
OF AN ESTATE.**

Court of Appeals for Clinton County.

MARY J. LEONARD V. STATE OF OHIO, EX REL B. D. SCOTT,
EXECUTOR.

Decided, May, 1914.

Estates of Decedents—Character of Proceeding for Recovery of Concealed Property—Defendant Competent to Testify—Burden of Proof—In Whose Favor Judgment Should be Rendered.

1. The purpose of Section 10673, making provision for proceedings when property belonging to the estate of a decedent has been concealed or embezzled, is not to furnish a substitute either for criminal proceedings for embezzlement or for a civil action to recover judgment for money owing to the executor, but rather to provide a speedy and effective method for discovery of assets belonging to the estate and secure possession of them for the purpose of administration.
2. In such an inquiry it is error to treat the defendant as a party to a civil action and therefore incompetent as a witness.
3. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the defendant received the money or other thing of value claimed to have come into his hands and that he concealed, embezzled or conveyed it away.
4. In cases where such a proceeding is instituted by an executor the judgment, if any is rendered against the defendant, should be in favor of the executor and not in favor of the state.

H. S. Pulse and W. W. Hester, for plaintiff in error.

Hayes & Hayes, contra.

JONES, O. B., J.; SWING, P. J., and JONES, E. H., J., concur.

This was a special proceeding originating in the probate court under Section 10673 and succeeding sections of the General Code, in which plaintiff in error here was charged with having concealed, embezzled or conveyed away money in the sum of \$700 belonging to the estate of Lucinda C. Baldwin, deceased.

An application was made to the probate court asking that a writ of citation issue against plaintiff in error, Mary J. Leonard,

1914.]

Clinton County.

requiring her to appear before said court and be examined under oath touching the matter of the complaint, and that such proceedings might be had in the premises as were authorized by law. She appeared before the probate court and proceedings were had there resulting in the finding by the probate judge against her.

The matter was then taken to the court of common pleas and there, a jury being demanded, a hearing was had before the court and a jury, resulting in a verdict finding that Mary J. Leonard was guilty as charged in the complaint filed therein, and that said jury had assessed the value of the property so concealed and embezzled at \$767.26. On this verdict a judgment was entered adjudging that the State of Ohio, for the use of B. D. Scott as executor of the estate of Lucinda Baldwin, deceased, recover against the said Mary J. Leonard the sum of \$767.26 with ten percent. penalty thereon, amounting to \$843.98, and the costs of the proceeding.

The purpose of the statute under which this proceeding was taken was not to furnish a substitute either for criminal proceedings for embezzlement, or for a civil suit to recover judgment for money owing to an executor of an estate, but rather to provide a speedy and effective method for the probate court to discover assets belonging to the estate of a decedent and to promptly secure same for the purpose of administration.

In this case it appears that decedent was an old lady, suffering from an incurable disease, and living alone in Blanchester, but under the care and observation of a niece who lived in an adjoining house, that she had on deposit in a bank \$600, and also on deposit in a building association \$100; that she had heard intimations that her niece or some one else was about to apply for letters of guardianship to take charge of her property, and with the fears and suspicions that often come to the aged she had thereupon withdrawn both sums of money in order to prevent their coming into the custody of others without her will. After her death, which occurred several months later, this money could not be found, and this proceeding was instituted for the purpose of tracing and locating it. Mrs. Leonard was a friend

of the deceased. She also lived alone, in a house immediately behind that of decedent, the two lots running back towards each other and being separated by an alley. The houses fronted upon parallel streets and had ready access to each other from a side street upon which they both abutted, and the testimony showed that the decedent visited Mrs. Leonard frequently.

Mrs. Leonard was called upon to say whether she had received this money, and if so, what she had done with it. She testified that she had received it from the hands of Mrs. Baldwin who gave it to her for safe-keeping; that she kept it for some time, locking it in a bureau drawer, and that she later returned it to Mrs. Baldwin in the identical bills enclosed in the same box in which it had been given to her. There was testimony from Mr. Scott, the executor, and Mr. Hayes, his attorney, and from Mr. Jack, who was one of the appraisers of the estate of Mrs. Baldwin, to the effect that in certain interviews they had had with Mrs. Leonard before these proceedings were instituted she had admitted the receipt of the money, that she claimed that she had paid it back, but that when told that it was proposed to bring proceedings to compel its repayment, she had promised to repay it again rather than be brought into court and stand the ordeal of a trial. There was no evidence whatever that she ever had the money, except the testimony of Mrs. Leonard, and of the admissions made by her. The rulings on the evidence seem to have permitted the statements that she had received the money, to stand, and practically to have excluded from the jury any statement that she had paid it back.

We are of the opinion that there were numerous errors in the admission and rejection of evidence. It is not necessary to point out the questions and answers specifically objected to, because the court below seems to have ruled on the evidence under a misapprehension as to the character of the proceeding. As has been stated, this was not a civil action for money, nor was Mrs. Leonard a party defendant in such capacity. She was cited before the court as a person suspected of having concealed money belonging to the decedent, and under the terms of Section 10673 she was required to be examined under oath, and it

1914.]

Clinton County.

was certainly her privilege to testify fully in relation to all matters covered by the complaint. Yet the court, evidently treating her as a party to a civil action to whom the terms of Section 11495 would apply, held that she was not a competent witness and ruled out testimony that had been given by her, and refused to permit her to testify on other matters as to which questions were propounded by her counsel. Even if Section 11495 might be held to apply to this case, under its terms, especially the exceptions under clauses 3 and 4 thereof, she would be entitled to testify fully as to the transactions, conversations or admissions of the opposite party. *Rankin v. Hannan*, 38 O. S., 438; 4 *Jones on Evidence*, Sections 772, 773.

We are of the opinion that she was a competent witness as to all matters covered by the complaint, and it was error to exclude her testimony.

The admissions of Mrs. Leonard testified to by Messrs. Scott, Hayes and Jack were embraced in conversations where attempted settlements were considered and discussed. It was error to admit testimony of conversations relating to any attempted compromise before the bringing of the proceeding. 2 *Jones on Evidence*, Section 291; *Sheriff v. Piper & Yenney*, 26 O. S., 476.

The court also erred in its charge to the jury in defining what constituted embezzlement, and also in placing the burden of proof upon the defendant below to show a return of the money. The burden was upon the plaintiff to prove the complaint by a preponderance of the evidence. This required proof not only that she received the money, but that she concealed, embezzled or conveyed it away.

Section 10678, General Code, provides that the jury shall determine the amount of damages to be recovered, if the party accused is guilty of having concealed, embezzled or conveyed away money of the deceased, and that the court shall render judgment in favor of the executor, or if there be no executor in favor of the state, against the person so found guilty for the amount of money so concealed together with ten percent. penalty and all costs. In this case there was no evidence of any sum beyond \$700 which had been had by the defendant, yet the jury

assessed the value of the property so concealed at \$767.26. This probably was upon a basis of adding interest upon the money from the time it had been placed in the hands of the defendant, although there is nothing whatever in evidence showing that it was to bear interest or that it was to be used or had been used by the defendant, and although the testimony given by defendant was that it had remained in the original package during all the time it was in her hands and until its return by her. The judgment of the court on the verdict was for \$843.98 with costs, being the entire amount of the verdict with ten per cent. penalty added. This amount would undoubtedly be excessive and contrary to law.

Under Section 10678, General Code, any judgment entered should be in favor of the executor and not, as it was, in favor of the state, as the statute provides that it should be entered in favor of the state only when there is no executor or administrator, or when it is against the executor or administrator.

For the reasons above given, the judgment is reversed and the cause remanded for further proceedings.

1914.]

Summit County.

COLLISION BETWEEN A LOCOMOTIVE AND STREET CAR.

Circuit Court of Summit County.

THE LAKE ERIE & WESTERN RAILROAD COMPANY V. THE NORTHERN OHIO TRACTION & LIGHT COMPANY.

Decided, April 12, 1912.

Negligence—Railroad Crossing—Train Standing Still—Duty to Give Notice Before Starting—Person on Street May Rely Upon Notice Being Given.

1. It is the duty of an engineer of a train or engine which has been brought to a stop in, or near to, a public street crossing, to give warning of his intention to start his train, in order that any one upon the street may be informed of the danger of attempting to cross the track, and further, to exercise reasonable and ordinary care to see that the way is clear.
2. A person upon a public street which crosses a railroad track, upon which is an engine or train standing still near the crossing has a right to rely upon the engineer of the railroad company giving notice before he starts his engine or train across the street.

Frank & Ream, for plaintiff in error.*Rogers & Rowley*, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

The plaintiff in error, by this proceeding, seeks the reversal of a judgment rendered against it in the court of common pleas, in favor of the defendant in error, in an action brought for recovery of damages arising out of a collision between a street car of the defendant in error and an engine belonging to the plaintiff in error.

Briefly stated, the facts, disclosed by the pleadings and the evidence, are as follows:

The railroad company owns and operates a steam railroad through the city of Akron, the tracks of which cross North Main street, a public highway, at grade. The traction company owns and operates a street railway line in and over certain streets in the said city. Among the streets occupied by its track is North

Main street. The railroad company's tracks in this street are intersected and crossed at grade by that of the traction company.

On the morning of September 30, 1908, one of the traction company's street cars was being operated on North Main street going in a northerly direction. At a distance of about fifteen feet from the southerly track of the railroad company the car was brought to a full stop. At about the same time one of the railroad company's engines with several cars attached, was being backed easterly across North Main street and across the intersection of the street railway and the railroad tracks. This engine was brought to a stop by those in charge of its operation at a short distance, the estimates varying from six to twenty feet, east of the street car track on which the street car was being run.

The day was the second day of the Summit county fair, and the traction company had stationed at the point of intersection of the tracks on North Main street a signal watchman, one of its employees, whose duty it was to ascertain if the crossing was free from danger for the passage of street cars over the railroad tracks and to signal motormen on cars approaching to cross the railroad tracks when the way was clear and free from danger.

On the occasion under consideration, the engine having passed a few feet easterly from the street car track and having come to a stop, the watchman signaled the motorman of the car that had stopped to cross the railroad track, and the motorman seeing this signal, and receiving also the proper indication from the conductor on his car to go ahead, put the car under motion and was moving northerly across the railroad tracks, when the engine which had been standing still, started westerly and collided with the street car, which was damaged to some extent by the collision.

The action below was for the recovery of the damage done to the street car, and was founded upon the contention that "the defendant recklessly, negligently and unlawfully started its engine without any warning or signal of its intention so to do, and negligently, carelessly and wrongfully drove its engine in and upon the said car of the plaintiff company."

The questions of fact involved in this contention, which were disputed by the defendant, were resolved by the jury in favor of the plaintiff, as is shown by the verdict in its favor.

1914.]

Summit County.

It is, however, contended by the plaintiff in error that the defendant in error on the facts of the case, as a matter of law, was guilty of contributory negligence, which must bar its recovery, and this is one of the grounds of error relied upon for a reversal.

The facts claimed to demonstrate that the defendant in error was guilty of contributory negligence are that the engine had stopped so close to the street car track as to indicate a probability that it was likely to start at any minute; that the engineer was on the northerly side of the engine and could not, and did not, see the car at any time; that the brakeman on the cars which were being moved by the engine was too far away from the crossing to do anything to prevent the collision; that the fireman on the engine was at the time engaged in fixing the fire; that the person occupying the position of the fireman on the left hand or southerly side of the engine, and who was supposed by the traction company's employees to be the fireman, but who in fact was not, was sitting at the cab window looking east in such a way as to indicate that he did not see the car; that the flagman who gave the signal to the motorman to cross the railroad track did not see the engineer, fireman or any one else connected with the engine, but gave the signal to cross solely on the fact that the engine had come to a stop; that the motorman and conductor both knew that the engineer was out of sight, and that they also knew that the person supposed to be the fireman was looking eastward and not paying any attention to the car; and that with knowledge of these facts, without any attempt on the part of the motorman or conductor to ascertain what was going to be done next with the engine, reliance was placed by them solely upon the flagman's signal, and the fact that the engine had come to a stop, in attempting to pass over the crossing in front of the engine.

It is the duty of an engineer in charge of a train or engine which has been brought to a stop in, or near to, a public street crossing, to give warning of his intention to start his train, in order that anyone upon the street may be informed of the danger of attempting to cross the track, and further, to exercise reasonable and ordinary care to see that the way is clear.

The authorities on this subject are considered in *Thompson on Negligence*, Section 1568, and the result stated in the following language:

"It is a sound conclusion that it is the duty of the engineer in charge of a train *standing still*, before starting his engine across a street, not only to give timely warning of his intention, but also to see whether his train will not be likely to strike a traveler or frighten his horses."

It was the duty, therefore, of those in charge of the engine belonging to the plaintiff in error, to give warning of their intention of moving across the street with the engine and to see that the way for passage was free.

The employees of the traction company, in charge of the car, had a right to rely upon the performance of this duty on the part of the employees of the railroad company in charge of the engine. The former were not bound to anticipate negligence on the part of the latter in the performance of their duties.

As was said in *Houcks v. Chicago, Milwaukee & St. Paul Railway Co.*, 31 Minn., 529:

"One who is called upon to exercise care to avoid danger from the acts of others may, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they will act with reasonable caution and not with culpable negligence."

Considering the special facts relied upon by the plaintiff in error as undisputed, and giving them full effect, we can not see that they, as a matter of law, show the defendant in error to have been guilty of contributory negligence. This was a question for the jury which was properly submitted to them by the trial court.

The views herein expressed are sustained by numerous authorities.

In *Robinson v. Western Pacific Railroad Co.*, 48 Cal., 409, a part of the syllabus reads as follows:

"If a track of a railroad passes along the street of a city, crossing another street, and a train of cars is stopped in the first street so that the last car in the train stands in the cross street, and while a person is walking along the cross street, over the

1914.]

Summit County.

track, behind the train, the train without any notification is suddenly backed, and the person is knocked down and injured by the cars, the employees of the company are guilty of gross negligence.

"The person injured in such case is exercising an undoubted right in crossing the railroad track on a public street, and is not guilty of such want of care or diligence as contributes to the injury, and the railroad company is not released from the liability on the ground of contributory negligence.

"The person injured in such case had a right to presume that he would be notified that the train was about to move, and was not bound to wait because the train was on the street, or assume that it might move suddenly backward without notice."

In *Railroad Co. v. Dawson*, 64 Kan., 99, is a case in principle like the one under consideration. The syllabus reads:

"The attempt of a traveler to cross the front of an engine standing near the crossing is not generally so inherently dangerous as to preclude a recovery of damages if the engine or train is unexpectedly started forward upon her, but in most such cases the question whether she has been guilty of negligence will go to the jury, especially where it moves upon her without giving any signals. Under the facts in this case, the district court did not err in holding the general rule as above stated to be applicable thereto.

"A traveler upon a public street, passing in front of an engine, fired up and warmed, standing without the bounds of the highway, but so near it that from the cab windows the street and objects within it can be plainly seen, has a right to assume that the engineer will not, without warning, start his locomotive and run over her upon the street before she can, while proceeding with haste and in the exercise of ordinary care and caution, cross the tracks upon which the engine is standing when she makes the attempt to do so."

The law is summarized in 33 *Cyc. of Law and Proc.*, 1036, in this language:

"Where there are trains or cars standing on or near a crossing, a person approaching the crossing has a right to assume that they will not be moved without proper warnings or signals, and if he attempts to cross with reasonable care and prudence, he is not necessarily guilty of contributory negligence, the question whether or not is he so negligent usually being one of fact."

See also *Micks v. Ohio River Railway Co.*, 52 W. Va., 99; *Pinney v. Missouri, Kansas & Texas Railway Co.*, 71 Mo. App., 577; *Palmer v. Detroit, Lansing & Lake Mich. Ry. Co.*, 56 Mich., 1.

It is also contended by the plaintiff in error that the court erred in giving the first request of the plaintiff below to charge before argument. This request was in the following language:

“If you find that at the time the transaction involved in this case the plaintiff street railroad company had a flagman stationed at the crossing where the street railroad tracks cross the tracks of the defendant company, and you further find that a street car of the plaintiff approached said crossing while the engine operated by the defendant company was backing toward the east across said crossing, and that said street car stopped south of said steam railroad tracks at a distance of from ten to fifteen feet, and you further find that the fireman on said engine saw said street car waiting to cross said tracks and you further find that said engine backed to the east to a point fifteen or twenty feet easterly of that point where the street car tracks cross the railroad tracks, and that said locomotive after clearing said tracks such distance stopped, and that the persons in charge of the same did not give any signal or notice of any intention to come forward, and you further find that after said engine had stopped and while it was stopped the flagman at said crossing signalled said car to come forward, then I say to you said street car had a right to go forward across said tracks, and it was the duty of the servants of the defendant in charge of said locomotive to exercise their faculties and to look for such car before starting their engine back over said street car track, and if they started their engine forward without looking or exercising their faculties to ascertain if the street car was crossing under the circumstances above stated, and plaintiff's car was injured as a proximate result of such starting, then the plaintiff is entitled to recover.”

We think this request is in harmony with the principles of law which are stated in the authorities already considered under the first assignment of error, and that it correctly states the duty of the servants of the defendant in charge of the locomotive, and the liability of the defendant for their neglect to perform such duty.

Complaint is also made that the court erred in refusing the defendant's fifth request to charge, which is in the following language:

1914.]

Summit County.

"If you find from the evidence that plaintiff's car was brought to a stop not less than ten nor more than fifty feet from the crossing; that defendant's engine then crossed the plaintiff's tracks and came to a stop on the east side thereof, or if defendant's engine had already crossed plaintiff's tracks when its car was brought to a stop, and if while defendant's engine and plaintiff's car were both stopped an employee of plaintiff's went forward on the crossing and signalled plaintiff's employee on the car to cross the railroad tracks; and if you also find that at the time such signal to cross was given that defendant's employees were either not visible to plaintiff's employees in charge of its car or if visible were not heeding or watching plaintiff's car, or did not see it and that such failure to heed or watch or see the car was known to plaintiff's employees in charge of the car or could have been known to them by the exercise of ordinary care, then and in such case it was the duty of plaintiff's employees to use such further ordinary care as a person in the exercise of ordinary care would use under similar circumstances, to ascertain whether it was in fact safe for the car to be driven upon or across the crossing; and if plaintiff's employees did not use such ordinary care, and without such ordinary care on their part drove the car upon or over the crossing, and that the failure to exercise such ordinary care contributed to the bringing about the collision and the resulting damage to plaintiff's car, then in such case plaintiff was guilty of contributory negligence and can not recover notwithstanding that defendant may also have been guilty of one or more negligent acts which also contributed to the bringing about of the collision and the resulting damage."

This request, if given, would have imposed the exercise of a higher degree of care upon the employees of the traction company in charge of the car than they are chargeable with under the law. They were not required to anticipate that the employees of the railroad company would be negligent in the performance of their duties, nor to take the steps required by the language of this request to guard against such negligence on the part of those in charge of the engine as would be involved in their starting it across the street without warning, and without informing themselves that the way was clear and free from danger to those who might be crossing the tracks.

We find no error prejudicial to the plaintiff in error in any of the matters complained of, and the judgment of the court of common pleas is affirmed.

APPLICATION OF THE RULE IN SHELLEY'S CASE.

Circuit Court of Summit County.

**CHARLES AKERS v. THE AKRON, CANTON & YOUNGSTOWN
RAILWAY COMPANY ET AL.**

Decided, April 15, 1912.

Deed—Rule in Shelley's Case Applied.

Where the granting clause of a deed is in the usual form and gives, grants, bargains, sells and conveys the premises therein described unto the grantee (Daniel Fulmer) his heirs and assigns, and the habendum clause reads, "to have and to hold said premises for and during his natural life, with reversion at his death to his children, heirs of his body, and their heirs and assigns, and if he dies leaving no children or legal representatives, then the above is to be and remain the property of the brothers and sisters of Daniel Fulmer, their heirs and assigns, forever," the rule in Shelley's case applies and the grantee takes an estate in fee simple.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

This action is here on appeal from the court of common pleas. The plaintiff claims to be the owner in fee simple and in possession of certain real estate, situated in the township of Springfield, county of Summit and state of Ohio, and especially described in the petition. The action is brought to enjoin the defendants from committing certain acts of alleged trespass upon said real estate, and for the recovery of damages for trespasses already committed.

The defendant, the Akron, Canton & Youngstown Railway Company, is a railroad corporation, organized under and by virtue of the laws of Ohio, and claims to be the owner of that part of the real estate mentioned in the plaintiff's petition which is described in its answer, and to be in possession thereof.

The conflicting claims of title to the real estate in question are based upon the following facts:

Prior to October 24, 1884, Adam Fulmer was the owner in fee simple of the real estate described in the petition which embraces that also described in the answer. On that day he ex-

1914.]

Summit County.

cuted and delivered to his son, Daniel Fulmer, a deed which is recorded in book 153, page 260 of Summit county records of deeds, conveying said premises to the said Daniel Fulmer. Adam Fulmer and his wife joined in the execution of the deed, and by the granting clause thereof, in consideration of \$10,000 they do give, grant, bargain, sell and convey unto the grantee, Daniel Fulmer, his heirs, and assigns, the real estate therein described, which includes that in controversy. The habendum clause of the deed contains the following language:

“To have and to hold said premises to the said Daniel Fulmer for and during his natural life, with reversion at his death to his children, heirs of his body, and their heirs and assigns, and if he dies leaving no children or legal representatives, then the above is to be and remain the property of the brothers and sisters of Daniel Fulmer, their heirs and assigns, forever.”

By deed of May 20, 1893, recorded in book 213, page 56, Summit county record of deeds, Daniel Fulmer conveyed the real estate described in the answer to the Akron & New Castle Railway Company, and this company subsequently deeded said real estate to the defendant, the Akron, Canton & Youngstown Railway Company.

Daniel Fulmer died January 14, 1903, leaving two children surviving him. The plaintiff claims title to the real estate in question through these two children.

If Daniel Fulmer acquired a fee simple estate by the deed from Adam Fulmer, then the said Daniel Fulmer conveyed a good title to his grantee, and that title has been acquired by the defendant, the Akron, Canton & Youngstown Railway Company. But if, on the contrary, the said Daniel Fulmer did not take a fee simple estate by the deed to him from Adam Fulmer, but only a life estate, as is contended by the plaintiff, then the children of Daniel Fulmer, upon his death, became the absolute owners in fee simple of the real estate involved in this action, and the plaintiff having acquired their title, would be the absolute owner of said real estate and entitled to the relief prayed for, unless other facts and principles of law invoked by said defendant should prevent him from obtaining such relief.

It is therefore essential that the deed from Adam Fulmer to Daniel Fulmer be considered, and the character of the estate thereby conveyed be determined.

It is claimed on behalf of said defendant that in construing the language of this deed, the rule in Shelly's case should be applied, and that by the application of this rule of law, it necessarily results that Daniel Fulmer took a fee simple estate in the premises conveyed.

It is contended on behalf of the plaintiff, however, that Daniel Fulmer acquired only a life estate in the premises conveyed by the deed, the remainder passing to his children.

In *McFely's Lessee v. Moore's Heirs*, 5 Ohio, 465, the rule in Shelly's case was stated in the following language:

"The rule is, where the ancestor takes a freehold and by the same conveyance, whether deed or devise, the estate is limited, either mediately or immediately, to his heirs, the words 'heirs' is a word of limitation, not of purchase and the fee vests in the ancestor."

In that case the testator had given his real estate to two persons named in his will, for their use during their respective lives, and had then provided, "But at their decease, my will is that these two tracts of land descend to their heirs, to whom I bequeathe the same to have and to hold said tracts to themselves, their heirs and assigns, forever," and it was held that the provisions of the will interpreted by the rule of Shelly's case vested a fee simple estate in the parties named in the will.

In *King v. Beck*, 15 Ohio, 559, it was said in the opinion of the court, on page 562:

"The rule in Shelly's case is not a rule of construction but a law of property. It is not designed to give a meaning to words, but to fix the nature and quantity of an estate. If the estate for life created in the devisee or donee, is limited precisely as it would descend at law, the rule in Shelly's case vests the entire fee in the first devisee or donee."

In *Brockschmidt v. Archer et al.*, 64 O. S., 502, part 1 of the syllabus reads as follows:

"Before the rule in Shelly's case was, as to wills, abrogated in this state by the statute of 1840, a testator devised certain

1914.]

Summit County.

lands to his son for life, and at his death to go to his heirs, and, there being nothing else in the will to show that the testator used the word 'heirs' to designate a more limited class as children: *Held*: That, as the lands passed under the will precisely as they would have descended at law, the son took an estate in fee simple in the lands so devised."

Reverting to the deed in question, it will be seen that the granting clause is in the usual form, and gives, grants, bargains, sells and conveys unto the grantee, his heirs and assigns, the premises therein described. By the habendum clause, the said Daniel Fulmer is "to have and to hold said premises for and during his natural life, with reversion at his death to his children, heirs of his body, and their heirs and assigns, and if he dies leaving no children or legal representatives, then the above is to be and remain the property of the brothers and sisters of Daniel Fulmer, their heirs and assigns, forever."

If the word "children" was used alone and not with the words "heirs of his body" following, the contention of the plaintiff would be well founded, and the word "children" in such case would be construed to be a word of purchase and not of limitation. But it is well settled that the words "heirs" or "heirs of his body" are to be construed as words of limitation and not of purchase, and the fact that the word "children" is here followed by the words "heirs of his body," indicates that the expression "heirs of his body" is to control.

It will be seen, also, that the estate here granted is limited precisely as it would descend at law, and in such case, the rule in Shelly's case vests the entire fee in the grantee.

In *The Continental Mutual Life Insurance Co. v. Skinner et al*, 4 C. C., 526, affirmed by the Supreme Court (30 Bul., 307), the granting clause was in the following form, "Do give, grant, bargain, sell and convey unto said grantees and their heirs the following described property." Following the description, the deed provided: "All the lands above conveyed are to be held and enjoyed by the said Wilson L. Skinner and Abbie Jane Skinner, his wife, during their natural lives, and at their decease, are to go and pass to their heirs." It was held that the grantees took an estate in fee simple.

We are of opinion, therefore, that the rule in Shelly's case is applicable to the language of the deed from Adam Fulmer to Daniel Fulmer, and that, applying the rule, the said Daniel Fulmer took a fee simple estate in the lands described in the deed, and that the defendant, the Akron, Canton & Youngstown Railway Company, has a fee simple estate in the lands described in its answer.

This conclusion renders it unnecessary to consider the facts relating to the possession of the premises in dispute, or the other principles of law cited by said defendant to defeat the plaintiff's cause of action.

The petition of the plaintiff is dismissed.

PROSECUTION FOR FURNISHING LIQUOR TO A MINOR.

Court of Appeals for Stark County.

DAVID HARRIS V. STATE OF OHIO.

Decided, February, 1913.

Intoxicating Liquors—Prosecution of a Saloon Keeper for Furnishing to a Minor—Proprietor Absent at the Time of the Alleged Offense—Instructions to Bar Keeper—Competency of Evidence—Charge of Court.

1. In a prosecution against the proprietor of a saloon for furnishing intoxicating liquors to a minor in which it appears that the bar tender had been instructed at the time of his employment not to sell to minors, unqualified and unequivocal proof of the absence of the proprietor at the time of such furnishing having been given in direct examination of the bar tender in defense of accused, the narration of any independent circumstance to fortify his own statement is improper in direct examination and properly excluded.
2. An instruction, in a prosecution for furnishing intoxicating liquors to a minor, that if the liquors were not furnished by the proprietor but by the bar tender, unless the proprietor consented to such furnishing by the bar tender then no conviction could be had and the burden is on the state to show that the furnishing was consented to by the state, is properly refused when the court charges generally that it is immaterial whether the furnishing was by the

1914.]

Stark County.

proprietor or the bar tender, unless it appears that such liquors were furnished without the authority and against the instructions of the proprietor given to the agent in good faith, and also, that the burden of proving defendant guilty is upon the state.

J. W. Craine, for plaintiff in error.

H. C. Pontius and *Frank N. Sweitzer*, contra.

SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.

Error to common pleas court.

David Harris, the plaintiff in error, was indicted at the January term, 1910, by the grand jury of this county for furnishing intoxicating liquors to one Florence Bonsky, a minor, to be drank by her and not being given by a physician in the regular line of his practice, to which indictment a plea of not guilty was entered. Trial was had resulting in a verdict of guilty. A motion for a new trial was filed which was overruled, thereupon the trial court sentenced the said David Harris to be "confined in the Stark county work house at Canton, Ohio, for the period of ten days and until discharged by due process of law, and that he pay a fine of \$25 and the costs of prosecution, and that he stand committed until said fine and costs are paid," to all of which defendant then duly excepted.

Thereafter the said David Harris caused a bill of exceptions to be taken embodying all the evidence taken upon the trial of said case, including the charge of the trial court, and now prosecutes error in this court by the filing of a petition in error to reverse said judgment of said court of common pleas. Numerous grounds of error are assigned in said petition in error for such reversal but the errors principally relied on and urged upon this court are as follows:

First. That the said court below erred in sentencing said defendant to said work house and to pay said fine and costs, and to stand committed until said fine and costs were paid.

Second. Said court erred in refusing the alleged instructions given by the plaintiff in error to his bartender in respect to selling liquors to minors.

Third. Said court erred in excluding evidence offered by the plaintiff in error upon the trial.

Fourth. Said court erred in refusing to give to the jury before argument a certain written request requested by the plaintiff in error.

Both counsel for plaintiff in error and counsel for the state agree that the court below pronounced a sentence upon the plaintiff in error that was both unauthorized and erroneous, and the first exception will therefore be sustained.

As to the second exception, an examination of the record shows by a reference had to page 45 therein that Frank Margo, a bartender and a witness for the defendant below, was asked whether or not the said defendant gave him any instructions while in his employ prior to January 10, 1910, as to selling or furnishing liquors to minors, which questions was objected to, and the record shows that no action of the court was taken thereon. Again on page 69 of the record said witness was recalled and was asked the following question:

"Q. I want to ask you whether prior to January 10, 1910, the defendant, David Harris, gave you any instruction on the subject of furnishing intoxicating liquors to minors? (State objects. Objection overruled. State excepts.) A. Yes, sir.

"Q. Do you remember when it was that he gave you such instructions? A. Yes, sir, when I started to work.

"Q. When was that? A. In November.

"Q. Of the year before? A. Yes, sir.

"Q. What did he say to you on the subject? A. He said I should be careful not to sell to minors."

It appears, therefore, that evidence relating to the alleged instructions of the plaintiff in error to the bartender Margo on the subject of furnishing intoxicating liquors to minors was allowed to be given and was given to the jury and that this question is not made upon the record.

Exception is taken to the action of the court below in excluding evidence offered by the plaintiff in error during the trial of said cause, upon objection by the defendant in error, on the subject of the absence of the plaintiff in error from his place of business Wednesday evening, January 5, 1910. After testifying that the plaintiff in error left his place of business about 5 o'clock on said evening, and that he did not return

1914.]

Stark County.

until midnight, the witness, Frank Margo, was asked the following question:

"Q. Do you have any particular reason for knowing that he was away on Wednesday night? (State objects. Objection sustained.)

"Q. Is there anything that you know of which directs your attention particularly to the fact that Mr. Harris was away on Wednesday evening, January 5, 1910? (State objects. Objection sustained. Defendant excepts.)"

Margo was a witness for the defendant below and when he stated unqualifiedly and unequivocally on direct examination that the plaintiff in error was absent from his place of business on the evening in question, was it the privilege and legal right of the plaintiff in error to have said witness fortify his statement in this respect by the narration of any independent circumstance. We think not, and we further think that the witness could only avail himself of this privilege if his recollection was being tested on cross-examination. We, therefore, hold that this exception affords no ground of prejudicial error.

Exception is also taken to the refusal of the court to charge request No. 2, on behalf of the defendant below, before argument, which said request was renewed by the defendant below at the conclusion of the opening argument on behalf of the state, and which request is as follows:

"If you find from the evidence that said intoxicating liquors were not furnished by the defendant in person to said Florence Bonsky, but were furnished by a bartender of the defendant, then your verdict should be for the defendant, unless you find from the evidence beyond the existence of a reasonable doubt that the defendant consented to said furnishing by said bartender, and had authorized said bartender to furnish intoxicating liquors to minors, and the burden of establishing such consent or authority is upon the state."

But said court did charge the jury on said subject as follows:

"I will say to you this, gentlemen, as a matter of law, that if you find in this case beyond the existence of a reasonable doubt that the defendant furnished to Florence Bonsky the intoxicating liquors as is averred in the indictment, and the other averments of the indictment by the same degree of proof then

it is immaterial whether he furnished that liquor directly or indirectly: I mean by that whether he furnished it himself or whether he furnished it by his bartender, if you find beyond the existence of a reasonable doubt that the bartender did furnish it and furnished it with his authority. While this is the law gentlemen, I desire to say to you further, that if you find from the evidence in the case that the liquor was furnished without his authority and against his instructions given in good faith, that he could not be convicted of the offense with which he stands charged in the indictment."

The request made, in our judgment, is broader in its terms in relation to the alleged instructions of the plaintiff in error to his bartender than is recognized by the Supreme Court of this state and in the case of *Anderson v. State*, 22 Ohio St. 305, wherein it is held that:

"The directions to the agent forbidding the sale must be in good faith, for, however notorious or formal they may be, they can have no effect, if they are merely colorable."

In the case at bar the court below gave this instruction in substance, and in refusing to give said request submitted by the plaintiff in error, we think the said court in this respect committed no error. But it is further contended by the plaintiff in error that said court erred not only in charging the jury upon the subject of instructions given to his bartender, but in refusing to charge the jury that the burden of establishing the consent or authority given to such bartender rests upon the state as stated in said request so made. In all criminal prosecutions the burden of proof rests upon the state to prove each and every material ingredient of the offense charged by that degree of proof required by law in such prosecutions, and it is made the duty of courts under the law to so instruct juries. How was it here? It is true that the trial court did not so expressly instruct the jury in connection with its instruction upon the subject of the alleged directions of the plaintiff in error to his bartender in reference to selling intoxicating liquors to minors, but on page 78 of the record it appears that said court charged the jury as follows:

1914.]

Stark County.

“The burden of proving the defendant guilty of the offense with which he stands charged by proof beyond the existence of a reasonable doubt is placed by the law upon the state, and the state must so prove the defendant guilty before it can ask a conviction of the defendant at your hands of the offense with which he stands charged in the indictment. The defendant is presumed, as every defendant in a criminal case is, to be innocent or not guilty of the offense with which he stands charged, and that presumption continues throughout the entire case until the state has removed it by proof beyond the existence of a reasonable doubt.”

Here is a clear and explicit instruction, clearly stated, to the jury upon the subject in question. True it was not a part of said request, nor was it necessary that it should be unless said request as a whole contained sound propositions of law; nor was said court called upon to repeat said instruction. For the reasons stated we hold that this exception is not well taken.

We have examined the record with reference to the other assignments of error in said petition, especially with reference to the ground of error alleged that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. While the record shows that the witnesses differ in their testimony both as to the date when the liquor was furnished, and the identity of the person furnishing it, these were facts for the jury to determine, and having determined them, we can not say as a reviewing court upon an examination of the entire record that the verdict of the jury is not sustained by the weight of the evidence or that the judgment below is contrary to law.

The judgment of the court of common pleas will be reversed and it is ordered that said case be remanded to said court for resentencing of the plaintiff in error according to law, and in all other respects said judgment will be affirmed.

**BOY KILLED BY THE STARTING OF A TRUCK IN SOME
UNKNOWN MANNER.**

Court of Appeals for Hamilton County.

THE JOHN C. ROTH PACKING COMPANY V. FLOYD C. WILLIAMS,
ADMINISTRATOR OF THE ESTATE OF ROY EYER, DECEASED.

Decided, July 24, 1914.

*Negligence—Heavy Electric Truck, Started by Unknown Agency, Runs
Over Boy Passing Along Sidewalk.*

The decedent, a boy twelve years of age, while walking along the sidewalk in the evening, was killed by being run over by a heavy electric truck which had been left for the night with the brake on and the controller removed, standing in an open space covered with a cement floor slanting toward the sidewalk and abutting thereon. In the absence of any evidence as to the agency which started the truck, the court holds that the boy met his death by reason of the negligence of the defendant owner of the truck in not leaving it in a safe and proper place where it could not injure persons lawfully passing along the sidewalk.

*Aaron A. Ferris and Thomas H. Morrow, for plaintiff in error.
Littleford, James, Ballard & Frost, contra.*

SWING, P. J.; JONES, O. B., J., JONES, E. H., J., concur.

This is an action in this court on error to a judgment of the court of common pleas, in which said court Floyd C. Williams, administrator, recovered a judgment in the sum of \$5,000 for the wrongful death of Roy Eyer.

Numerous errors are alleged in the petition in error but only one was urged upon the argument of the case and in the brief submitted. This alleged error is that the judgment is not sustained by the evidence.

In the petition, after setting out the appointment of the plaintiff as administrator of the estate of the deceased and the allegation of the corporate capacity of the defendant, the plaintiff alleged that the building of the defendant is so constructed that instead of a continuous front wall along the entire length, there

1914.]

Hamilton County.

is an open space about fifty feet in length and extending to the height of the first floor; that the second and upper floors immediately above said space are supported on three pillars which are located on a line with the front wall at a distance of about twenty-three feet apart, and that this open space extends back from the sidewalk and front wall of the house a distance of about twenty-eight feet; that the floor of said open space is covered with concrete which slopes towards the street; and that on the 14th day of June, 1911, said open space was temporarily used for the storage of automobile trucks belonging to the defendant company; that on or about the 14th day of June, 1911, said Roy Eyer, deceased, was lawfully on the sidewalk on the north side of Gest street, walking east; that when said decedent arrived at the point in the sidewalk immediately in front of the open space above referred to, an automobile belonging to the defendant company, without any signal or warning, and without any person guiding or controlling it, rushed out of said open space in which it had been temporarily stored, down upon plaintiff's decedent, and before he could get out of the way, knocked him down and crushed him under its wheels, causing a fracture of the skull and internal injuries from which he subsequently died. Plaintiff further says that said death of the decedent was directly due to the position and condition in which said defendant company negligently left said automobile truck, and that decedent at the time was in the exercise of all due and proper care on his part.

Said defendant filed an answer admitting the appointment of plaintiff as administrator of said estate, and that the defendant is a corporation under the laws of Ohio; that it is the owner of the plant on the north side of Gest street and the open space in said premises as set out in the petition. Defendant further says that said open space was temporarily used for storing automobile trucks belonging to defendant company.

For a second defense, the defendant alleged that at the time of the accident and prior thereto and at the present time, it is in the business of buying, curing and selling at wholesale and retail, meats to be used for food for residents and citizens

of Cincinnati and throughout a large portion of the United States; that in the conduct of its business it is the owner of and uses large and extensive buildings and storage warehouses situated on Oehler and Gest streets in said city, and in such business it owns and uses large trucks and vehicles operated by electricity as a motive power, and that each of said trucks weighs about 11,000 pounds; that the garage or storehouse where said trucks are usually stored and kept when not in use, is located on Oehler street; that on or about the 13th day of June, 1911, said Oehler street was being repaired by the city of Cincinnati, and by reason thereof defendant could not place or store its said trucks in said garage on Oehler street and was compelled to store its said trucks, for temporary purposes only. and in the night time, in said covered and open space belonging to the defendant, on Gest street, the space described in the first defense herein, and that it was necessary in the usual course of its business to charge with electricity the said trucks for a motive power for use in propelling said trucks on the day following, and so to charge them after the day's work was done, in the night time from the supply of electricity within the building on Gest street. And on the 13th day of June, 1911, about the hour of 8:30 o'clock in the evening of said day, one of the above trucks described, with other vehicles, had been placed in said open space, when the same truck, alleged in the petition to have run upon and caused the death of plaintiff's intestate, and had been charged with electricity, and the brake used on said truck had been set, and the controller on said truck used for turning on and into said truck the current of electricity for its propulsion had been disconnected so that said truck could not move or be put in motion without unlocking the brake thereon. and without connecting said controller with the electric current by some human agency; and said defendant, through its employees and agents, had used all means necessary and ordinarily used under like circumstances to place and keep said truck in a safe and secure position to the end that it could not be used or moved except by the agents or employees of the defendant in the line of defendant's business as aforesaid; that on the night

1914.]

Hamilton County.

of said 13th day of June, 1911, the night on which plaintiff's intestate met his death, a group of boys, ranging in age from about twelve to sixteen years, whose names except that of Roy Eyer are unknown to the defendant, the number of boys in said group being also unknown to the defendant, among them being plaintiff's intestate, Roy Eyer, who was a boy about twelve and a half years of age, none of whom were in the employ of the defendant or under the authority or agency of the defendant, at the hour named, while it was dark, against the repeated warnings of defendant or without notice to the defendant or its employees, one of said group of boys, or someone unknown to the defendant, got upon said truck, and in playing thereon, carelessly or wilfully, and without fault, knowledge or acquiescence of defendant or any of defendant's employees caused said controller to be connected with the electric current theretofore charged and stored in said truck as aforesaid, and thereby caused said truck to get in motion; and that while said plaintiff's intestate, Roy Eyer, was on the premises of defendant as a trespasser, and against the warning given theretofore by defendant and its employees, and without any fault on the part of the defendant, the truck so put in motion as aforesaid, and while said plaintiff's intestate was a trespasser on said premises, and solely through the carelessness and negligence of plaintiff's intestate, or through the fault or carelessness of his said companions or through the fault or carelessness of some one unknown to defendant, none of whom were in the employ or acting under the authority of defendant, ran upon and caused the death of plaintiff's intestate.

Full time was given to counsel in the argument of the case orally, and able and elaborate briefs have been furnished us, and we have gone over the evidence very carefully, with the result that we are of the opinion that the judgment is sustained by the evidence. From the evidence the jury had a right to find, as they must have done, that Roy Eyer while walking along the sidewalk next to defendant's premises was suddenly struck by an automobile truck which darted out of the defendant's premises, and was killed by said truck. The jury were

warranted by the evidence in finding that said Roy Eyer was in no way responsible for the truck leaving its position on the premises of the plaintiff in error and rushing upon him while he was walking along said sidewalk. The evidence does not clearly show the cause which produced the movement of the truck, but the fact remains that the truck was placed by the defendant in a place unguarded and open, and on a floor of cement slanting towards the sidewalk, in a position where it could be easily got at by persons passing along the street who would be inclined from any motive to interfere with it. While there is no direct evidence which shows that defendant's employees put said truck in motion, which resulted in the death of said Eyer, still it is equally clear that the defendant did not safely guard and place said truck in a safe and proper place, which seems to us, under the circumstances of this case, to show that the plaintiff's decedent met his death by reason of the negligence of the defendant in its not placing its truck in a safe and proper place so that it might not injure persons lawfully passing along said sidewalk.

**RIGHTS UNDER CIVIL SERVICE OF EMPLOYEES ON
THE ELIGIBLE LIST.**

Court of Appeals for Hamilton County.

STATE OF OHIO, ON THE RELATION OF JOHN WEISS, v. EDWARD S.
KEEFER ET AL, CIVIL SERVICE COMMISSIONERS OF
THE CITY OF CINCINNATI.

Decided, October 17, 1914.

*Civil Service—Determination as to Eligibility for Promotion Can Not be
Reversed—Subsequent Board Bound by Such Determination.*

Where the commission has once determined that a member of the police force is eligible for promotion and promotion is duly made after competitive examination, it is without power to subsequently reverse its decision with respect thereto, and a subsequent board is bound by such former action.

1914.]

Hamilton County.

*Denis F. Cash, Alfred Bettman and Henry Hunt, for relator.
Walter M. Schoenle, City Solicitor, and Charles A. Groom,
Assistant Solicitor, contra.*

JONES, O. B., J.; JONES, E. H., J., concurs; SWING, P. J., concurs in a separate memorandum.

This is an action in mandamus brought by relator to order the defendants, as civil service commissioners, to certify in connection with the payrolls of the police department that relator had been appointed and was during the period beginning the 1st day of August, 1912, and ending the 15th day of September, 1914, employed in pursuance of the act passed April 28, 1913, to regulate the civil service (as found in 103 O. L., 698), as a sergeant in the police department of the city of Cincinnati, such a certificate to be given under a requirement found in Section 21 of said act.

Defendants filed an answer in which they admit that the relator was duly appointed and acted as a corporal in the police department from August 1, 1912, till March 19, 1913, and that since the latter date he had been performing the duties of a sergeant in the police department, but they question the regularity and legality of his appointment, and ask for a dismissal of the petition.

There is no dispute as to the facts, between the parties, but defendants contend that because the relator had not, at the time he was examined for promotion, served two years in the department as a corporal, that he was ineligible for an examination at that time and was improperly placed upon the eligible list by the civil service commission and that therefore his appointment, which was then made by the director of public safety from the eligible list, was illegal.

Under the rules of the police department and civil service at that time promotions were made from the position of corporal to that of sergeant by appointment from an eligible list which was prepared by the civil service commission upon promotional examinations held by it. Such an examination was held on March 10, 1913, in pursuance of a resolution of the commission passed February 28, 1913, as follows:

"The chief of police has made a verbal request that all corporals in the police department at the present time be admitted to the competitive examination for sergeancy, as only three corporals are now in the service who are eligible under the rules. Safety Director Cash had made requisition for certification for appointment to the position of sergeant, and there is no eligible list.

"The secretary was directed to hold the promotional examination for this grade as soon as possible and notify all corporals that they are eligible for the examination."

This resolution was adopted without dissent, at the meeting, by the three commissioners who at that time made up the civil service commission.

At that time one of the rules and regulations which had been adopted by said civil service commission was Rule 84:

"No corporal who has not had at least two years' service as corporal in the police force of the city of Cincinnati shall be permitted to take an examination for promotion to the position of sergeant."

These rules also contained Rule No. 110, as follows:

"No amendment of these rules shall be made, nor shall any rule be repealed, nor any new rule adopted at the same meeting at which it is proposed, and no final action to amend, repeal or supplement these rules shall be taken in less than seven days after its proposal and until after a public hearing, of which the commission shall give notice in at least two newspapers of general circulation in Cincinnati."

The sections of the civil service law in existence in March, 1913, providing for this promotional examination, which it is necessary to consider in this case, are Sections 4480, 4481, 4482, 4483 and 4486, and under their provisions the commission was given full power to prepare rules and regulations to provide for the "grading of offices and positions similar in character in groups and divisions, so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions." In pursuance of this power the commission had provided, by Rule 84, that no corporal who had served less than two years as such should be eligible for examination for ser-

1914.]

Hamilton County.

geant. There is, however, no statutory requirement as to the length of time a corporal should serve as such before being eligible for examination for sergeant.

From the action taken by the commission on February 28, 1913, it appears that at that time there were but three corporals then in the service who had been there the necessary two years to make them eligible for certification to the position of sergeant, and that there was then no eligible list. As under Section 4481, it was the duty of the commission, upon being notified by the safety director of a vacancy to be filled in the position of sergeant, to certify to him the three candidates graded highest on such an eligible list, it is apparent that if the rule requiring two years' service as corporal had not been waived or suspended, only three corporals could have taken the examination and if all three had successfully passed such an examination there would have been but three names to be certified on the eligible list for the making of one appointment as sergeant. The evidence shows that more than one sergeant was to be appointed at that time—the relator himself being the second appointment made under that examination—and it is therefore clear that as a matter of convenience it was then desirable for the commission to waive or suspend that rule if they had the power. No formal amendment or change in Rule 84 was made at that time by the commissioners and no steps were taken to that end as provided by Rule 110, but the action taken by the commission in its proceedings of February 28, 1913, in providing for the holding of the promotional examination for sergeants while not constituting an amendment or change of its standing rules, was, in effect, a suspension or waiver of the provisions of Rule 84.

We are of the opinion that the civil service commission had the power to so waive or suspend this rule, and that its action in making all the corporals then on the force eligible to this examination was within its power, and that the examination was within its power, and that the examination was held according to law. Nor was it necessary to note on its minutes that a rule had been suspended, there being no objection on the part of any member and all members being present. *Cushing's Law*

of *Legislative Assemblies*, Sections 794 and 1478; *Wyman on Administrative Law*, 108; *State v. Bd. of Ed.*, 2 C. C., 510, at 515; *City of Cleveland v. Hamman*, 17 Colo., 30.

The record shows that the statute was complied with in all particulars with regard to the examination which relator passed, and in making of his appointment. Upon a requisition made by the director of public safety for an eligible list, Weiss was duly certified upon that eligible list by the civil service commission itself, and he was duly appointed by the director of public safety, and the commission was notified of his appointment by the director of public safety, and Weiss' name was then placed upon the official roster of the commission kept in pursuance of Section 4483, General Code, and has been so continued up to the time it is now questioned.

The civil service commission having been invested by law with the power to determine the eligibility of Weiss, and having determined him to be eligible, is without power to subsequently reverse its decision. *Matter of Lazenby*, 116 App. Div (N. Y.), 135 (aff. Ct. App., 188 N. Y., 588), *People v. Cobb*, 13 App. Div. (N. Y.), 56; *People v. Preston*, 62 Hun. (N. Y.), 185 (aff. 131 N. Y., 644).

29 Cyc., 1433:

"If the power has been given to any officer to determine a question of fact, his determination is final, provided he has not been guilty of an abuse of discretion. Such a determination is binding upon the successors in office of the officer who made it."

Justice Brown, in the opinion of the court in *Noble v. River Log Co.*, 144 U. S., 165, discusses the power of an officer acting in a quasi judicial capacity to reverse the decision of his predecessor in the same office.

In the case of *Ptacak v. People, ex rel*, 194 Ill., 195, which is relied upon by defendants, the title of the assistant superintendent of police in Chicago was attacked directly by *quo warranto*, the statute requiring the promotional examination to be limited to members of the next lower rank; the officer whose title was attacked was not a member of the next lower rank, and was therefore rendered by statute ineligible to examination, and

1914.]

Hamilton County.

was held to have been illegally appointed. This case can not apply to the case at bar, as it was there not a mere waiver of rule on the part of the commission, but a violation of the statute.

If it was desired to raise the question of the regularity or legality of his appointment, Section 29 of the act furnishes an opportunity for a direct attack upon his title, and it would be conducive to a stronger feeling of reliance upon the stability of their tenure by civil service employees, to have any question raised as to their titles by such a proceeding, rather than by a refusal of the civil service commission to certify on the pay-roll names that have been placed and so long maintained by them upon their official roster.

The name of the relator being properly upon the roster, and his employment as sergeant having been made in pursuance of law, it was the duty of the civil service commission to furnish the certificate required under Section 21 of the civil service act.

A writ of mandamus, as prayed for, will therefore be allowed.

SWING, P. J.

Judge Swing concurs in the above decision, for the reason that the civil service commission having been invested by law with the power to determine the eligibility of Weiss, and having determined him to be eligible, it is without power subsequently to reverse its decision, and the present board is bound by this former action.

DETERMINATION AS TO THE VALUE OF A HORSE.

Circuit Court of Lorain County.

HENRY BUDDENBURG v. ANTHONY WEARSCH.

Decided, April 20, 1912.

Measure of Damages—Value Given By Witnesses—Other Evidence of Value—Charge as to Value.

Where the question of the value of a horse is before the jury and witnesses have given their opinions as to its value, describing it, it is not error to instruct the jury that if it, from other evidence in the case, was of the opinion that the horse was worth less than the value put upon it by the witnesses, they might so decide upon their own judgment.

Q. A. Gillmore, for plaintiff in error.

Fauver & Rice, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

Defendant in error was plaintiff below, and recovered a judgment against plaintiff in error for the wrongful death of his mare, which he claimed resulted from the negligent use of a pistol by Buddenburg on the premises of Wearsch.

It appeared from the evidence that on Thanksgiving day, 1908, the parties to this action, who are brothers-in-law, and Joe Wearsch, brother of Anthony, had been out hunting in the forenoon, and came back to the Wearsch farm about noon. There they probably had some hard cider, and fell to discussing the relative merits of a new revolver owned by Henry and an old one belonging to Joe. They decided to try the "guns," as they called these revolvers, and Joe and Henry went outside the house to shoot at a mark east of the house; some horses, among them the mare which was killed, were north of the house. The old gun didn't work very well and it went off unexpectedly in the hands of either Joe or Henry, and probably this shot hit the mare, although nobody at the time knew of that fact. The horses ran off down the lane to the woods, and toward evening the mare

was found there suffering in a fence corner and had to be put out of her misery.

Joe says the revolver went off in Henry's hands; the hired man was the only other person present at the time; he is uncertain as to whether the gun exploded in the hands of Henry or Joe; at least he contradicts himself upon the question. Anthony and his wife testify that Henry came in to wash the powder marks off of his hand, then went out again, and he and Joe and Anthony, who went out with then, continued to shoot at a mark, the old revolver meanwhile having been fixed up so that it would work properly.

In the evening, after they had killed the mare, Anthony testified that Henry said *he* had shot the mare and that Anthony should go and buy another horse and he would pay for it, and within a week Henry did give him twenty dollars towards payment for the new horse.

Joe also testifies that he heard Henry say he had shot the mare and that he would pay for another horse.

Mrs. Wearsch testifies that Henry said he shot the horse, that Anthony was going to kill him for it and he wanted Mrs. Wearsch to come out and quiet Anthony down; that he would pay for another horse, and he was going to bury the revolver in the same hole with the mare.

Henry testified that the gun went off accidentally twice, first in Joe's hands, after which they noticed the horses running down the lane and spoke about Roxie, the mare, drooping her head, and afterwards in the hand of Henry, when he was fixing it.

The evidence in this case is conflicting, but it is evident that on the evening of the day the mare was shot, everybody, including Henry, thought that he had shot the mare. Afterwards he evidently changed his mind and didn't want to pay for the mare, but there was evidence in the case tending to show that he was responsible for the mare's death, and we are unable to say that the verdict was not sustained by sufficient evidence. The jury saw all the witnesses, and gave such credit to each one of them as they were entitled to in their judgment.

Doubtless the jury believed that Henry admitted that the death of the mare was due to his carelessness, and so believing, brought in a verdict against him.

Complaint is made that error was committed in permitting the witness C. H. Johnson and John Stark to testify as to the reasonable market value of the mare at the time in the community, but as they qualified and knew the mare, there was no error committed in this respect.

After the jury had been charged and had retired, it came back into open court for further instructions, and one of the jury men addressed the court as follows:

"The question is, the jury is undecided as to whether in fixing a value for this horse they can go below the value given in the petition?"

And thereupon the court instructed the jury as follows:

"The measure of damages is the market value of the horse at the time, giving credit for \$19, which the plaintiff claims he has had. What that market value is, you are to determine from the evidence in the case, and the evidence in the case on that subject was not all alike."

And thereupon the said juror inquired of the court:

"Can they go, for instance, below the lowest value that is placed upon this animal?"

To which the court replied:

"I think as a proposition of law that they could not, unless the parties might feel willing to agree to give the jury a little latitude; but otherwise than that, you must determine it from the testimony in the case and base it upon that. I say this: that when a witness testifies as to his judgment as to the value, he also testifies as to his knowledge of the horse, and if there is testimony as to the horse that will enable you to fix a value upon it, you can do so regardless of the judgment of those who testify on that subject. Do I make myself plain? Supposing a case where there was testimony that a horse had but three legs and those who saw the horse and placed a value upon it placed it at a certain sum, but they described the horse sufficiently to you so that you are able to say that such a three legged horse as that was not worth so much money, you have a right in that instance to take into consideration your own judgment. In other words, you are not absolutely bound by the amount fixed by them, if there is other testimony in the case that will warrant your disregarding it. I think I will leave that instruction in that shape."

1914.]

Summit County.

It is claimed that these remarks of the court were prejudicial to plaintiff in error, but while the first sentence of the final instructions was not strictly correct, and the illustration used by the trial judge was not a happy one, still taking the whole paragraph, the law was fully and properly charged, and the jury was clearly authorized under it and distinctly given to understand, that though the witness had given their own opinions as to the value of the mare, still, if the jury, from other evidence in the case, were of the opinion that she was worth less, they might so decide upon their own judgment.

No other errors are alleged to have occurred on the trial, and having disposed of all that has been brought to our attention in favor of defendant in error, the judgment is affirmed.

**AS TO THE CHARACTER OF A RIGHT TO MAINTAIN A
SEWER ACROSS PREMISES.**

Circuit Court of Summit County.

THE PETERSON & WRIGHT COMPANY V. THE CITY OF AKRON.

Decided, April 20, 1912.

License Distinguished from Easement—Public Sewer—Recitals in Other Instruments Not Conclusive.

1. Whether the right to maintain a sewer across premises of another is a mere license or an easement is to be determined from a consideration of the terms of the instrument creating the right, even though the right is claimed by a municipal corporation and the sewer in question is a public sewer.
2. Reference to a contract granting a license to maintain a sewer across premises of another as a contract granting a "right-of-way for a sewer" when found in a conveyance from the owner of the premises to another than the licensee, is not conclusive as to the character of the right created by the contract.

Boylan & Brouse, for plaintiff in error.

N. M. Greenberger and J. Taylor, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

The prayer of the petition in this case is for rescission of a contract between the plaintiff's predecessor in title and the city of Akron, by the terms of which the city was granted the right to lay and maintain a sewer across property now owned by plaintiff; the petition also prays that plaintiff's title to said premises may be quieted as against any claims of the city under said contract.

There is no dispute as to the facts in this case. The whole case turns upon the proper construction to be put upon said contract. If under it the city obtained a mere license, plaintiff has a right to terminate said license, which it has attempted to do. If the city, by virtue of said contract and its acts thereunder in constructing said sewer, obtained an interest in the land of defendants, plaintiff can not terminate said interest without the city's consent.

The contract in question was executed in 1894, the Brewster Coal Company, plaintiff's predecessor in title, being the first party, and the city of Akron the second party. It recites:

"That the party of the first part for and in consideration of the covenants and agreements of the party of the second part, hereafter mentioned, does hereby give to the party of the second part a *license and permission* to construct, maintain, operate and keep in repair a sewer, and to change the nature and size of the same, upon the following described parcels of land."

Then follows a description of two parcels of land about twenty-three feet wide, extending diagonally across the plaintiff's premises from High street to Main street, in the city of Akron.

Following this description are certain covenants on the part of the city of Akron; that it will do no unnecessary damage to the first party's land adjoining said premises, or to its structures thereon; that it will indemnify and protect first party, its successors and grantees, from all damages by the exercise of the right granted; that it will restore the premises and any structure thereon to as good condition as they were in before excavation, and that subject to the use of the premises described, the first party shall have the right to use said premises.

The first party is specifically released "from any obligation to warrant its right to grant said license," and it is further

1914.]

Summit County.

agreed that if any of the agreements of the city are held to be beyond its power and authority, "then the license and permission granted by said party of the first part shall thereupon, and for that reason, terminate and become null and void," and the sewer shall be removed.

Although the instrument is signed by the parties, it is neither witnessed nor acknowledged. However, it was recorded in the office of the recorder of Summit county.

A reading of this instrument convinces one that it was intended as a license and not as a conveyance. In the first place, the instrument itself purports to be only a license; as recited, it *gives a license and permission to construct, maintain, operate and keep in repair a sewer*. No other operative terms are contained in the instrument. It is three times recited in the agreement that it is a "license and permission," and four more times it is recited that it is a "license."

The parties themselves having thus characterized it, it is hard to construe it as anything else. If it is a mere license, witnesses to it and an acknowledgment would make it nothing more, and the fact that it lacks witnesses and an acknowledgment is further evidence that parties themselves considered it merely a license.

It is significant that no estate in the land is mentioned and no interest therein is described. It is true that in the conveyance from the Brewster Coal Company to the plaintiff, occurs the following clause:

"Also excepting and reserving the *right of way* for a sewer *as shown* by a contract by and between the Brewster Coal Company and the city of Akron, Ohio, said contract being dated March 5th, 1894, and recorded in Book 78, page 578, Summit county records."

While this clause brings home to plaintiff notice of the city's rights, if any, *as shown* by the contract, it can not enlarge them, for the city was not a party to this deed, and calling the city's rights under the contract a "right of way for a sewer," does not make it an easement, if the original instrument creates a mere license, as we have seen it does.

There is no duration fixed for the life of this license; on its face it appears to be personal and probably terminated when the Brewster Coal Company parted with its title to the land. At any rate, like all mere licenses, it is revokable and the plaintiff having revoked it, and there appearing to be no equitable consideration favoring the defendant, except that it should have ample time to make other arrangements for the sewer, plaintiff appears to be entitled to the relief it prays.

In our conclusions we are sustained by the following authorities: *Wilkins v. Irvine*, 33 O. S., 138; *Yeaker v. Trening*, 79 O. S., 121; *Fowler v. Delaplain*, 79 O. S., 279; *Rodefer v. Railroad*, 72 O. S., 272; *City of Hamilton v. Ashbrook*, 62 O. S., 511.

In the last mentioned case, the contract between the city and the proprietors of the lands is set forth, and will be found to be very similar to the contract in this case, yet Judge Shauck, on page 517 of his opinion says: "That instrument was a license."

Decree may be entered for plaintiff, as prayed for, but not to go into effect until the city has had reasonable time in which to make other arrangements for taking care of the sewage now flowing through the sewer in question.

CONSTRUCTION OF BUILDING RESTRICTION WITH REFERENCE TO PORCH ROOF.

Circuit Court of Summit County.

THE PORTAGE PARK LAND COMPANY V. ROSE B. BURCH ET AL.

Decided, April 20, 1912.

Building Restriction—Porch Construction.

A restriction in a deed which requires that no building, except an open porch, be erected nearer the street line than twenty-five feet, is not violated by the erection of an open porch upon the restricted territory, although the roof of said porch is but a continuation of the roof of the main building.

Stuart & Stuart, for plaintiff in error.

Wilcox, Parsons, Burch & Adams, contra.

1914.]

Summit County.

WINCH, J.; MARVIN, J. and NIMAN, J., concur.

The land company in this appealed action asks for the enforcement of a building restriction contained in defendants' deed, which requires that no building, except an open porch, be erected upon defendants' lot nearer the street line than twenty-five feet.

The main part of defendants' home, recently erected, is about two feet farther back from the street line than the restriction requires, but the roof of the front porch is a continuation of the main roof of the house as it slopes toward the street. Exhibition of this kind of roof is common in the architecture of the day, but it is said that by reason of the siding on the main part of the house being carried out to the front into the triangular space included between the roof and ceiling of the porch and the front of the house, the view from a second-story porch on any house which might be built to the east of defendants' house, would be obstructed.

The porch, outside of this roof, is a remarkably open one. The few posts supporting the roof are not large; the railings are slight and graceful.

In order to make light and view for two chamber windows upstairs in the front of the house, the porch roof is cut down and a deck roof constructed, leaving at each side thereof the sloping roof complained of, perhaps six feet wide on each side of this deck roof.

The pitch of the main roof, which is the pitch of that part of the porch roof that is complained of, is nearly forty-five degrees.

It is conceded that defendants are entitled to a substantial roof over their porch, so that in the last analysis, the only objection plaintiff can have to defendants' porch roof is that it is too steep on the side parts. In view of the fact that this roof begins two feet back of the restricted area, it is apparent that it is about two feet lower at the twenty-five-foot line than it would have been if the front of the house had been on that line. This undoubtedly explains the fact that a photograph of the premises taken from the west with another house and porch between the camera and defendant's porch hardly shows the latter, while a photograph taken from the east, with no intervening house, rather magnifies plaintiff's contention.

The court viewed the premises, however, and finds the construction of defendants' porch and roof thereof to be within the language of the restriction; it is an open porch and requires no alteration to make it conform to the requirements of the deed.

Upon the argument of the case, counsel for plaintiff suggested that to permit the construction here complained of, might encourage some other lot owner in the restricted territory to extend the main part of the second-story of his house out over the porch in the manner sometimes seen.

So far as this case is concerned, the suggestion has no influence, for defendants have not done such a thing and disclaim all intention of so doing. It will be time enough to complain of what somebody else may do, when he does it.

The petition is dismissed.

FIXING THE VALUE OF EXTRAORDINARY SERVICES.

Circuit Court of Cuyahoga County.

CARRIE G. PRENTISS V. EZRA WOODS.

Decided, April 20, 1912.

Administrator—Allowance for Extraordinary Services.

The mere fact that an allowance to an administrator for extraordinary services rendered his estate seems somewhat large will not warrant the circuit court, on error, in reversing the judgment, the probate judge, with his expert knowledge of the value of such services having first fixed the amount, and the common pleas court, on appeal, having fixed the same amount.

Otis, Beery & Otis, for plaintiff.

Grant, Seiber & Mather, contra.

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

This case originated in the Probate Court of Summit County, by plaintiff filing exceptions to the account of defendant as administrator of the estate of Prof. Bates, deceased, in which he

1914.]

Cuyahoga County.

claimed \$500 extra compensation for extraordinary services rendered the estate. The probate judge heard the parties and their evidence on these exceptions and allowed the claim of the administrator.

On appeal to the common pleas court, it did the same thing.

The case is here on error, with a bill of exceptions showing all the evidence taken on the hearing in the common pleas court, and we are asked to reverse its judgment solely on the weight of the evidence.

It appears that Prof. Bates died in California, leaving some personal and real property there. He left some personal property located here at the time of his death, and some located in Massachusetts.

Defendant applied for and was granted letters of administration in Summit county, Ohio, and at once set about obtaining possession of the assets in the other two states. He was met with the claim that Prof. Bates was a resident of California at the time of his death. This claim was important, for if true, it altered the distribution of the estate.

Prof. Bates left a widow and no children. Under the laws of Ohio, his widow would inherit his entire estate; under the laws of California, she would inherit but half of it, and his sister, plaintiff herein, would inherit the other half.

In the settlement of this question, depositions had to be taken in Oregon and in California; services of counsel were required, with many consultations and directions; the hearing on this question was long and it was hotly contested; defendant lost the point, but still continued, under advice of counsel, in his effort to bring all the assets of the estate under one administration here, so as to save expense and loss.

He succeeded, with some considerable labor, in securing possession of the Massachusetts assets; meanwhile the public administrator in California made claim to the assets there, but the administrator here, after much delay, considerable trouble and by good management, secured control of the personal assets in California. The real estate there remains for administration by the California public administrator under the laws of that state.

In all, defendant has administered upon about \$25,000 of assets.

The foregoing is a summarized statement of defendant's unusual service in this estate; it does not set forth the many little things he did in connection with the collection of the Massachusetts and California assets, and some unusual trouble he had in the collection of part of the Ohio assets.

It is apparent that defendant performed some services for the estate in his charge which an administrator in this state is not ordinarily called upon to perform.

Ordinarily the estate of a deceased resident of Ohio is located at his residence, and the administrator has little trouble in reducing it to his possession, converting it into money and distributing it. For these services he is compensated by a percentage, not large, as any other agent is compensated. But where, as here, he renders unusual services, they are by statute denominated extraordinary services, and for them he is entitled to additional compensation.

The two courts below undertook to fix the value of the extraordinary services, which were without doubt rendered by this administrator. That he was entitled to *some* extra compensation is equally without doubt. The amount fixed, \$500, seems large, but it is not so large that this court, without recent experience in such matters, can say that the probate judge, with his intimate knowledge of the value of such services, got it too large. The probate judge is an expert in such cases. We bow to his judgment.

Judgment affirmed.

**REASONABLENESS OF A RULE GOVERNING THE SLAUGHTER
OF CHICKENS.**

Circuit Court of Lorain County.

R. H. SHUTE v. CITY OF ELYRIA.

Decided, April, 1912.

Rule of Board of Health—Reasonable Rule—Slaughtering Chickens.

1. A reasonable construction should be given to a rule of the board of health of a city, intended for the protection of the health of its inhabitants, to the end that it may be enforced.
2. One who dresses chickens in a room in the same building with his meat market and connected with it on the same floor, can be punished for the violation of a rule of the board of health providing: "No fowls or animals shall be kept confined, nor shall same be slaughtered or dressed in any basement or any building, a part of which is used and occupied as a market where meats are sold for food."

Q. A. Gillmore, for plaintiff in error.

G. B. Findlay, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

The plaintiff in error was prosecuted before the mayor of the city of Elyria, and found guilty of violating Section 46, paragraph 29, of the rules and regulations of the board of health of said city. This regulation reads:

"No fowls or animals shall be kept, confined, nor shall same be slaughtered or dressed in any basement or any building, a part of which is used and occupied as a market where meats are sold for food."

It was shown upon the trial that Shute conducted a meat market in the city of Elyria, and that on the 28th of April, 1911, he slaughtered and dressed chickens in a room in the same building with his meat market and connected with such market and on the same floor with the room in which his meats were sold, the slaughtering, however, being done in a room back of the one in which meats were sold. The slaughtering and dressing would

appear to have been done with care, and the work conducted as cleanly as that kind of work can be done.

By proper proceedings, the case was brought into the court of common pleas on error, where this judgment of conviction was affirmed, and the case is now here upon proper proceedings seeking a reversal of the judgment of affirmance and the judgment in the mayor's court.

It is manifest that the accused violated this rule of the board of health, if the same is to be construed literally, and this question is presented in the case: "Had the board of health authority to establish this rule?" The statute which authorizes the establishment of the rule, if the board had the authority to establish it, is Section 4413 of the General Code of Ohio, which reads in part:

"The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances."

This, of course, does not authorize the board of health, arbitrarily, to establish a rule that is without reason, but it leaves in the board a very broad latitude in determining what is reasonable.

As said in *Walton v. Toledo*, 13 C. D., 547, quoting from the opinion of Judge Haynes at page 551:

"The powers that are given to the various boards of health, and the laws enacted for the purpose of protecting the people of the state from contagious diseases and from the sale of diseased or impure articles, are about as broad as language can make them. They extend into every relation of life, and the protection of health is one of the most important departments that the Legislature has to deal with."

We think that a rule which would make it an offense to do things done by the accused in this case, would be a reasonable rule to be adopted by the board of health.

Rules may be reasonable in one municipality which would not be reasonable in another, and in the absence of evidence showing the particular surroundings or the population or the character

of business buildings in a particular municipality, we must presume that if the regulation adopted by the board of health in any municipality could be reasonable in any municipality, then it is reasonable in the municipality in which it is adopted, for the presumption, in the absence of evidence, is that the rule of a board of health or an ordinance of a particular municipality is proper for such municipality, unless facts are shown to the contrary by proper evidence; so that, if the rule under consideration adopted by the board of health of Elyria would be suitable and proper, in short, would be reasonable in any municipality, we must treat it as reasonable in the city of Elyria, because we have no evidence in the record as to the character of the city of Elyria, its population or kind of buildings in the city, and of these facts we can not take judicial notice.

And this brings us to the consideration, therefore, of whether the particular rule under which the plaintiff in error was prosecuted is a reasonable rule.

It will be noticed that the language of the rule is very broad. It is made an offense to "keep confined any fowl or animal," and it is also made an offense that "any fowl or animal be slaughtered or dressed in any basement or building, any part of which is used and occupied as a market where meats are sold for food." If these words are to be construed in their broadest sense, it is manifest, we think, that the rule would be unreasonable. A building might be and often is, in a municipality, used in part as a grocery store, and in the upper stories and at a distance from the room used as a grocery store, are rooms occupied as a dwelling place by a family. In such grocery store salt meats, such as bacon, hams, pork and dried beef are sold for food.

The word "animal" is very comprehensive. Anderson's Law Dictionary gives as a first definition, "Any irrational being as distinguished from man"; "in a common sense, a quadruped, not a bird nor a fowl." Again: "While the use in any particular context or statute may be limited by the general meaning and purpose, the term, in jurisprudence may include any living creature not human or rational."

The word "fowl" is also very comprehensive, and the definition both in Webster's Dictionary and in the Century Dictionary, makes it include birds of all kinds, both domestic and wild, as the word "fowler" is used to mean the man who hunts birds.

If these broad definitions were to be applied to the construction of this rule, the family which should keep a canary bird in the living rooms hereinbefore spoken of as being in the same building with a grocery store where salt meats are sold, would be a violator of the rule; so, also, would the family keeping a parrot in such manner, or, indeed giving the word "animal" its broadest meaning, the keeping of a gold-fish in a glass globe by any such family would be a violation of the rule, and surely, the keeping of a pet squirrel in a cage would be a violation of the rule. But from the fact that both the words "fowls" and "animals" are used in the regulation under consideration, it is clear that the word "animal" was not used in its broadest sense. If it had been, there would have been no occasion to use the word "fowl" and the words following the prohibition as to the keeping of fowls or animals confined, to-wit, "nor shall the same be slaughtered or dressed in any basement or building," etc.; it would seem that a fair construction of the rule would be that the offense is committed when animals or fowls intended to be slaughtered are kept, as well as when such animals are slaughtered or dressed in such building, the offense is committed.

We think this is a reasonable construction of the rule, and if, upon any reasonable construction the rule can be upheld, it must be for the same reason that a statute must be upheld as constitutional, if by any reasonable construction of the statute it can be so held. We do not say that the construction suggested is the only one under which the rule could be upheld, but certainly with such construction it can be, and as such construction seems to be reasonable the result is that we hold the rule to be valid, and this necessarily results in our finding that the judgment should be and is affirmed.

It is suggested that if the attention of the board of health is called to the matter, the rule under consideration may be so amended as to relieve it from any possible misconception.

1914.]

Richland County.

**WHEN THE QUESTION OF CONTRIBUTORY NEGLIGENCE
BECOMES ONE FOR THE COURT.**

Circuit Court for Richland County.

J. P. ARRAS, ADMINISTRATOR, v. THE B. & O. RAILWAY.*

Decided, January, 1913.

*Negligence—Employee Pulling Truck Over Switch Track Struck by a
Freight Car After Receiving Warning.*

The testimony indicating that the decedent had warning of his danger in time to have saved himself, the question of his contributory negligence became one for the court, and was not one to be submitted to the jury, and there was therefore no error in directing a verdict for the defendant.

W. J. Bissman and W. S. Kerr, for plaintiff in error.
McBride & Wolfe, contra.

BY THE COURT (Taggart, Voorhees and Shields, JJ.).

This was an action in the court of common pleas to recover damages for the wrongful death of one Adam Arras, charged to have been caused by reason of the negligent acts of the defendant in error.

The averments of the petition are that the defendant owns, operates and controls a track leading from the main line of its road to and among the shops of the Barnes Manufacturing Co. near the city of Mansfield, in Richland county, Ohio, and that said track was so used by the defendant for the accommodation of said Barnes Manufacturing Co. in shipping its products; that said track was so located that the employees of the manufacturing company were compelled, in the performance of their duties, to pass over said track, and for that purpose they had established a regular place for crossing the same; that said crossing has long existed and was well known to the defendant, its agents and servants; that the time of moving cars upon said track is unfixed and is at the discretion of said company, and that the said deced-

*Affirmed without opinion, *Arras v. B. & O. Railway Co.*, 89 Ohio State.

ent, Adam Arras, had no knowledge or notice thereof; that the advance of the cars, by reason of the noise of the factory, can not be heard separate and apart from the other noise of the factory, all of which had a tendency to render said track extremely dangerous; that, by reason of such dangerous condition, the defendant had caused a flagman or watchman to be stationed at said crossing, at the time of moving cars, to give notice to the employees of said Barnes Manufacturing Co. and to notify and warn them of danger, and that the defendant relied upon such notice being given.

It further recites that on or about the first of June, 1910, the said Adam Arras was pulling a large truck along the passage way leading to and over the said crossing above specified: that the approach to said crossing was obstructed by buildings and that the crossing itself was left unguarded by defendant at that time, and no one placed by it to give warning of the approach of cars, and with no one on the front of the moving cars along said track to give warning to persons who had occasion to cross said track at said crossing; and without notice, knowledge or warning, and while exercising care on his part, and without negligence on his part, he entered on said crossing and was struck by a box car that was being pushed by an engine that was owned and controlled by the defendant and operated by the defendant, its agents and servants, and received injuries by reason of such collision which caused his death and which occurred on the day last mentioned.

The case was submitted to the jury upon the evidence of the plaintiff and at the close of plaintiff's testimony, the court on motion directed the jury to return a verdict for said defendant. It is this action of the court in directing a verdict for the defendant that is complained of in the petition in error filed in this court to review the proceedings of the court of common pleas.

It is claimed by the defendant that the said Adam Arras was guilty of negligence contributing to his own injury and that by reason of such contributory negligence, the plaintiff would not be entitled to recover in this action.

The testimony discloses that, just prior to the accident, a foundry foreman of the Barnes Manufacturing Co. passed the

1914.]

Richland County.

decedent, Adam Arras, who was then pulling a large truck towards the track of the railroad company, which truck was being pushed from behind by one Rudolph; that Rogers, the foreman, when he reached the middle of the railroad track, saw for the first time that the cars were being backed along the track from the south and towards the crossing, and immediately turned and gave warning to the decedent, throwing up his hands and saying to him "Go back," and at the same time he almost immediately turned and stepped across the track, supposing that the decedent was in a place of safety.

The foreman further testifies that, when he was in the middle of the track, the decedent, Adam Arras, was from six to eight feet behind him when the warning was given, and that, supposing that he would protect himself and make himself safe, he himself crossed the track to the west side and the cars backed between him and the decedent and the other party who was pushing the truck. After the car had passed about half the length of itself, he heard a crash and learned that the decedent had been struck.

The court is of the opinion, from the testimony of the witness Rogers, that the decedent had warning in sufficient time to have saved himself from collision with the moving cars; that the car was about 30 feet to the south when the warning was given, as shown by the evidence, and that he could have saved himself from injury; and that, as a matter of law, he was guilty of contributory negligence in proceeding toward the track after the warning had been received, and in coming in collision with the moving cars, by reason of which he was injured.

The court is of the opinion that whether or not the decedent was guilty of contributory negligence is not a question of fact to be submitted to the jury but is a question of law to be determined by the court; and that, for this reason, the action of the court in sustaining a motion to direct a verdict was proper and was not error. The judgment of the court of common pleas is affirmed with exceptions.

OFFICERS OF A VILLAGE ADVANCED TO A CITY.

Circuit Court of Summit County.

PETER O. WISE, A TAX-PAYER, ON BEHALF OF THE CITY OF
BARBERTON, v. CITY OF BARBERTON ET AL.

Decided, May, 1912.

*Municipal Corporations—Advancement of Village to City—Mayor's Veto
Power—Compensation of Councilmen.*

1. Upon advancement of a village to a city as provided by law, village officers become city officers and the mayor, in such case, has the power of veto.
2. Where there is no valid ordinance fixing the compensation of councilmen, upon the induction into office of the first council elected after the advancement of a village to a city, such council can fix the compensation of its own members.

O. D. Everhard and S. D. Kanfield, for plaintiff.

*Rogers, Rowley & Mathers and N. E. Boden, City Solicitor,
contra.*

WINCH, J.; MARVIN, J., and NIMAN, J., concur.

In this case an order is prayed for to restrain the city of Barborton from paying, and its several officials from receiving, certain salaries attempted to be provided for them by an ordinance passed by the council of the city of Barborton on the third day of January, 1912, said officers having been elected and their terms having begun previous to the passage of said ordinance.

The case grows out of a situation developed by Barborton's increase in population.

Barborton was a village until the census was taken in 1910; by that census it was developed that Barborton had a population of more than five thousand; that fact was later officially made known to the Secretary of State of the state of Ohio, and, on the 18th day of January, 1911, the Secretary of State issued a proclamation stating that fact. Thirty days later, to-wit, on February 17, 1911, Barborton became a city, by virtue of the last

paragraph or sentence of Section 3498 of the General Code, which reads as follows:

“From and after thirty days after the issuance of such proclamation, each municipal corporation shall be a city or village, in accordance with the provisions of this title.”

The “title” thus referred to is Title XII, “Municipal Corporations,” which embodies the whole law upon the subject of municipal corporations, and is commonly called the municipal code. The only section of said code having reference to the transition of a village to a city is Section 3499. It reads as follows:

“Sec. 3499. Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation, shall continue in force until changed or repealed.”

This meager legislation on the subject produces difficulties and inconsistencies which can not be escaped.

Barberton became a city in February, 1911; its officers, originally elected as village officers, continued in office until January, 1912; from February, 1911, to January, 1912, were they village officers or city officers, and were their powers and duties prescribed by the statutes governing village officers or by the statutes governing city officers? The powers and duties of village and city officers are quite different.

Since the statutes themselves do not answer the question the court is required to answer it in a manner which will produce the least confusion, and as seems most conducive to good government.

In examining the question here involved, the facts of this case alone have been considered, and it has not been deemed necessary to lay down any general rules governing all questions which might arise under the sections quoted.

The only things that are made absolutely certain by these two sections are that Barberton was a city, from and after February 17, 1911, and the only officers it had until January, 1912,

were the individuals who originally had been elected as village officers. December 11, 1911, the council of the city of Barberton, composed of the individuals who had been elected as members of the council of the village of Barberton, passed an ordinance fixing the salaries of the city officials recently elected, who would come into office the following January.

This they had a right to do, but the mayor vetoed it, and said ordinance was never passed over his veto.

Did he have a right to veto this ordinance? If he did not it is still in force and the prayer of the petition should be granted. If the mayor had a right to veto the ordinance of December 11, 1911, a second question arises: Did the new council on January 3, 1912, have a right to fix the salaries of city officials whose terms began before said date?

The mayor of a city can veto an ordinance; the mayor of a village can not.

Though the learned Attorney-General of the state has given it as his opinion that in a situation like this the mayor would not be vested with the veto power, he does not sustain his opinion with argument, and we see no good reasons why the mayor should not have and exercise the powers of a mayor of a city. Was Barberton a city in name only, until January, 1912, or was it a city in fact? That it was a city in fact is to be deduced from language used in Section 3499—"the ordinances thereof (of the village) not inconsistent with the laws relating to the new corporation, shall continue in force until changed or repealed."

What is meant by the expression "laws relating to the new corporation"? It means that part of the municipal code which lays down the rules governing cities, if the new corporation is a city, as in this case.

The laws governing cities, then, apply here, and we hold that the law vesting the veto power in the mayor of a city applies and the mayor had a right to veto the ordinance of December 11, 1911, and it never went into effect, because it was not passed over his veto.

The argument *ab inconvenientum* of counsel for plaintiff, has not impressed us. We see no difficulty in the village mayor

giving up his place as president of the council and turning it over to the president *pro tempore*, the latter being a village officer capable of acting as president of the city council, thus relieving the mayor of any equivocal situation, growing out of his former power of deciding tie votes in the council, and also exercising his new veto power.

Now what was the situation which confronted the new officers after their terms began?

There were several new officers; a city solicitor, directors of public safety and public service, and a city auditor; the village had never had such officers.

The mayor of a village receives a small salary and fees in state and municipal cases and certain license fees; the mayor of a city can not receive fees in state cases. The old salary ordinance of the village of Barberton provided for the mayor's compensation in accordance with the law regulating villages; the mayor of a city can not receive such compensation as was provided by said ordinance; said ordinance also failed to provide for the new city officers, hence said old village ordinance is "inconsistent with the laws relating to the new corporation," and therefore it did not continue in force. (Section 3499.)

We now have the new city officers entering their terms with no salaries fixed for their compensation.

The new city council proceeded to fix their salaries on January 3, 1912, and it is the salaries thus fixed that plaintiff claims should not be paid.

He says that said ordinance contravenes Section 4213, General Code, which reads:

"The salary of any officer, clerk or employee shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

This statute applies only to a case where a salary has been fixed and not where no salary has been provided.

In order to increase or decrease a salary, there must be something to increase or decrease. The Legislature can not have

intended that salaries might not be provided where none had been provided before, for then there would be no way of compensating officers of newly created municipal corporations, and there would be difficulty in finding persons to fill such offices and perform the duties thereof.

This is the conclusion reached by Judge Evans, of the Franklin County Common Pleas Court, in a well-reasoned opinion citing authorities which abundantly sustain his views: *State, ex rel, v. Carlisle*, 3 N.P.(N.S.), 544.

That case was never carried higher, and we concur in the views there expressed.

The ordinance of January 3, 1912, fixed the compensation of councilmen at the same figure it had been under the village government, so that there is no question here of public policy forbidding a man fixing his own compensation, or acting as judge in his own case, as was suggested on the argument.

Nor have we here any part of the salaries to enjoin, under the Crosser act, for the ordinance was passed as an emergency measure, and we hold that it was such. Surely an emergency existed; no salaries had been provided for the city officials, and they might all refuse to act and the city government be crippled and paralyzed. This is a different situation from one involving an increase in salaries.

The petition is dismissed.

1914.]

Cuyahoga County.

PROSECUTION FOR KEEPING A PLACE WHERE INTOXICATING LIQUORS ARE SOLD.

Court of Appeals for Cuyahoga County.

JOHN A. SANDERS V. STATE OF OHIO; JASPER POST V. STATE OF OHIO, AND AUGUST PFAFF V. STATE OF OHIO.

Decided, March 25, 1913.

Criminal Law—Accused Named in the Affidavit by his Initials—Proof as to the Sale of Liquor on Sunday—Jury Trial Not Necessary on the Issue of Former Jeopardy Under Charge of Unlawfully Keeping a Place Where Intoxicating Liquors are Sold—Variance.

1. Courts take judicial notice that Christian and surnames are abbreviated. Hence, in a prosecution before a mayor under General Code, 13195, for keeping a place where intoxicating liquors are sold in violation of law, the fact that accused is named in the affidavit by initials instead of his full name does not necessitate a reversal for variance under General Code, 13582, especially where no objection is made on the trial thereto and in his internal revenue certificate and state liquor tax application it appears that his name is designated by such initials.
2. Proof of a single sale on Sunday of intoxicating liquors in a room furnished with bar fixtures, a bar tender and other indicia of a place where liquors are kept, justifies a conviction under General Code, 13195, for keeping a place where intoxicating liquors are sold contrary to law.
3. The inhibition of General Code, 13195, as to unlawfully keeping a place for sale of intoxicating liquors is not limited to dry territory but includes unlawfully keeping a place on Sunday.
4. Plea of former jeopardy is properly heard and determined by a mayor under General Code, 4528, in a prosecution for unlawfully keeping a place for sale of intoxicating liquors contrary to General Code, 13195, and, since the prosecution is for a fine only, a jury trial is not necessary.

Geo. W. Shaw and M. Bernstein, for plaintiffs in error.

John A. Chamberlain, David E. Green and Cyrus Locher, Prosecuting Attorney, contra.

JONES, J.; METCALFE, J., and FERNEDING, J., concur (sitting in place of Judges Winch, Meals and Grant).

Error to Common Pleas Court.

Plaintiffs in error were each brought before and convicted by J. R. MacQuigg, mayor of East Cleveland, upon affidavits based upon Section 13195, General Code, charging them with keeping a place in the adjoining city of Cleveland where intoxicating liquors were sold in violation of law. The convictions were each affirmed by the common pleas court, and proceedings in error are here instituted to reverse the judgment of the lower courts.

The cases involve similar questions, except that in the Pfaff case the additional claim is made that Pfaff, as shown by the record, has been once in jeopardy for the same offense before a Cleveland city justice of the peace; and that when he had demanded a jury before the East Cleveland mayor, upon a plea in bar, he was denied the same.

It is claimed in all three cases that the judgments below are against the evidence, in that the showing of a single sale could not be held to be a violation of the statute as to keeping, etc.; that the defendant, Sanders, was not shown to be the John A. Sanders who was on trial. The testimony refers to the defendant as "J. A. Sanders"; the internal revenue and state licenses were issued to "J. A. Sanders" but it is insisted that this "J. A. Sanders" was not shown to be the John A. Sanders charged in the affidavit. The record does not show that defendant made any issue of the fact on the trial, but reserved it for review only. The variance is not material. Courts will take judicial notice that Christian and surnames are abbreviated. If tried under indictment it would not appear to be prejudicial to the defendant under Section 13582, General Code. While the section is not made applicable, in terms, to procedure before magistrates, we think that no prejudice arose to the defendant which would necessitate reversal for that cause. Furthermore, no proper action was taken at the time by defendant objecting because of variance. What has been said as to Sander's case applies as well to the Pfaff case.

Again, it is urged that proof of a single sale on a single day does not dignify the offense as one of keeping a place.

1914.]

Cuyahoga County.

Strictly speaking, that is true. Under the law a single sale is of itself an offense punishable as such. Where, however, a single sale is accompanied by proof evidencing the indicia of a place where liquors are kept, showing the connection wherewith a room furnished with fixtures, bartender or other evidence connecting such sale with the place, such proof in connection with a single sale may be sufficient to justify of "keeping a place," etc. We are not convinced that there was a failure of proof in this regard, or that the judgment was against the evidence. The circuit court of the fourth circuit has held, as above stated, in cases of similar character. But here appears the additional fact that the sale in question was made on the first day of the week. Therefore, a showing of the place and a single sale therein, would fall within the inhibition of Section 13195, General Code. This view is supported by the case of *Lynch v. State*, 12 C.C.(N.S.), 330 (affirmed, without opinion, *Lynch v. State*, 81 Ohio St., 489).

While the sale in the foregoing case was in violation of law, as being made in dry territory, the principle is analogous where the violation of law claimed is under Section 13050. General Code.

Plaintiffs in error urge that Section 13195, General Code, applies only to the keeping of places and the violation of law in dry territory. It is somewhat difficult to follow counsel in this phase of the case, for the reason that Section 13195, General Code, was substantially as it is now, long before the local option laws were effective in this state, and in its original form applied to the entire state.

But the argument is wholly unavailing for the reason that the plain import of the section applies to any place where intoxicating liquors are sold in violation of law. Furthermore, under the local option sections of the code, Sections 13225, 13226, General Code, special provisions are made for punishment and abatement in cases where the places are within dry territory.

The defendant below, August Pfaff, filed before the mayor of East Cleveland his plea in abatement, alleging former acquittal for the same offense before a justice of the city of Cleve-

land, and demanded a jury upon that issue; this the mayor refused, and himself heard the entire case, including the issue of former acquittal. Plaintiff in error, Pfaff, relies on his right to a jury on Section 13630, General Code, found in title 2, part four of criminal procedure. Section 13630, General Code, is made applicable to criminal proceedings upon indictment and is lodged in title 2, part four.

Sections 10490 and 10491, General Code, do not apply the procedure of Section 13630, General Code, to justices' and mayors' procedure, as will be seen from an inspection of those sections.

Under Section 4528, General Code, the mayor has final jurisdiction in misdemeanor cases, unless the accused, is, by the Constitution, entitled to a jury trial. The offense charged under Section 13195, General Code, against the defendant was punishable by fine only. The mayor had complete and full jurisdiction to hear and determine the offense including every issue made, and including the plea of former jeopardy. Section 4528, General Code, clothes him with full final jurisdiction to "hear and determine any prosecution for a misdemeanor." Any issue embraced within that "prosecution" may be therefore determined by him, without the intervention of a jury.

That, upon a second conviction, the defendant's place may be abated as a nuisance and that a constitutional right to a jury trial would then accrue to him, and that by force of the second, therefore, need not now be discussed, for obvious reasons. A second offense was not charged.

Upon an inspection of the record in the three cases, we are constrained to hold that no prejudicial error has been committed and the judgments of the mayor and the common pleas court will be affirmed.

Cause remanded to the mayor's court for execution and for further proceedings according to law.

1914.]

Huron County.

APPOINTMENT OF STREET COMMISSIONER.

Court of Appeals for Huron County.

STATE, EX REL CHARLES MCCRAY, v. C. H. BURK ET AL.

Decided, June 8, 1914.

Municipal Corporations—Mayor's Appointment of a Street Commissioner to Fill a Vacancy—Must be Confirmed by Council—Temporary Appointment Unauthorized, When.

1. An appointment of street commissioner to fill a vacancy requires confirmation by the village council the same as an appointment for the full term as prescribed by Section 4363, General Code.
2. An appointment of street commissioner of a village on or before the first Monday in February is limited by Section 4251, General Code, to an appointment for a full term of a year which under Section 4363, General Code, requires confirmation of the council; hence, a "temporary appointment" of one whom council refuse to confirm as street commissioner to "prevent a stoppage of public business" as prescribed by Section 4488, General Code, which applies only to civil service employees, is unauthorized and invalid.

Wickham & Martin, for plaintiff.

Craig & Pruner and *W. J. Tossell*, contra.

RICHARDS, J.; KINKADE, J., and CHITTENDEN, J., concur.

Appeal from common pleas court.

The action is one in mandamus to compel the defendants, members of the council of the village of New London and the clerk of said village, to authorize and direct the drawing of a warrant, and to draw such warrant, on the treasurer of the village to pay the relator the salary claimed to be due him as street commissioner. The controversy turns on whether the relator was the street commissioner during the month of February, 1914, for which period he demands that an order be allowed and drawn to cover his compensation. In the court of common pleas the petition of the relator was dismissed.

It appears from the pleadings and evidence that one E. H. Hood was the street commissioner of the village, appointed by

the mayor and confirmed by the council, for the year 1913; that at the expiration of his year in the office, and without waiting for any successor to take his place, he abandoned the duties of his office, in effect leaving a vacancy. On January 1, 1914, the mayor appointed A. B. Davis as street commissioner for one month and that appointment was confirmed by the village council, but Davis failed to give any bond to secure the performance of his duties as such street commissioner, until February 5, 1914, although he in fact assumed to perform the duties of the office. On January 12, 1914, the mayor appointed George Reis street commissioner, which appointment the council declined to confirm. On February 2, 1914, the mayor appointed the relator, Charles McCray, as street commissioner, and the council declined to confirm his appointment. Thereupon the mayor submitted a written communication reading as follows:

"The council having failed without just cause to confirm my appointments for the office of street commissioner and no complaint having been offered as to the ability and efficiency of the appointees in question, I hereby appoint Charles McCray temporary street commissioner to prevent the stoppage of public business. Said appointment to terminate when the contingency has passed.
(Signed) W. I. BRACY, Mayor."

Mr. McCray executed a bond, with sureties, on February 6, 1914, to secure the performance of his duties as street commissioner, conditioned as follows:

"Now if the said Charles McCray as such street commissioner (emergency) aforesaid shall faithfully perform the duties of his said office until the contingency caused by the failure of council of said village to confirm said appointment by mayor is removed, then the above obligation to be void."

The controversy between the mayor and the village council arises from the construction to be placed on Section 4363, General Code, and other statutes *in pari materia*. The section above cited reads as follows:

"The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his successor is appointed and qualified. He shall be an elector of the corporation. Vacancies in the office of street com-

1914.]

Huron County.

missioner shall be filled by the mayor for the unexpired term. In any village the marshal shall be eligible to appointment as street commissioner."

Counsel on behalf of the relator contend that by the plain reading of the statute the appointment of a street commissioner to fill a vacancy does not require the confirmation of the council, and it is contended by counsel for the defendants that all appointments for street commissioner are incomplete until the same have been confirmed by the village council.

The record discloses that the street commissioner for 1913, Mr. Hood, in effect abandoned the office and thereby created a vacancy which should have been filled by appointment, the appointee to hold for the unexpired term and until his successor should be appointed and qualify. The mayor undertook to fill that vacancy by naming A. B. Davis, but this appointee failed to qualify until February 5, 1914, on which date he executed a bond in accordance with statute. He did, however, in effect, hold the office during the month of January and was at least the *de facto* street commissioner. By virtue of the provisions of Section 4251, General Code, it was the duty of the mayor to appoint a street commissioner between the second Monday in January and the first Monday in February, for the full term of one year. He attempted to perform that duty by naming the relator as street commissioner on February 2, 1914, and, on the council refusing to confirm the appointment, he then sought to name the same man as street commissioner for a temporary period. The mayor assumed that Section 4488, General Code, authorized a temporary appointment, but that section applies only to appointments in the civil service. The only appointment which could have been made at that date would have been an appointment for the full term of one year, and such an appointment would, by plain language of Section 4363, General Code, have required confirmation by the council.

The circuit court of the sixth circuit, sitting in Fulton county, in the case of *State v. Darby*, 12 C. C., 235, held that the misapprehension of the true tenure of the appointee, on the part of the mayor or others, could not abridge the term of his contin-

uance in office. It would follow that any attempted limitation in the terms of the appointment would be ineffective and that the appointee, if he became street commissioner by virtue of the appointment of February 2, 1914, would hold for the period of one year and until his successor should be appointed and qualify.

We do not, however, rest the decision of this case on that proposition alone, but construe Section 4364, General Code, when read in connection with other parallel statutes, to require a confirmation by the village council of all appointments to the office of street commissioner, whether for a full term or a vacancy, in order to perfect the title of the appointee. It is doubtless true that a literal reading of the language of the section does not require such confirmation. Neither does it provide for the omission of such confirmation in filling a vacancy in the office. The statute in question provides that an appointment for the full term shall be confirmed by the council, and all that the remaining portion of the section provides for is that in case of a vacancy appointment, the appointee shall hold for the unexpired term. The section does say that the vacancy shall be filled by the mayor, but it does not say how it shall be filled, and the fair inference is that it shall be filled in the same manner as the office was filled for the full term, namely, appointment by the mayor and confirmation by the council.

To so construe this section as to allow the mayor to fill a vacancy in the office of street commissioner without the concurrence of the village council, would result in an anomaly in the statutes. By other sections of the statutes the street commissioner is under the direct control of the village council and that body has the power to determine whether he shall have assistants and this is true whether the official be an appointee for the full term or to fill a vacancy.

An examination of the statutes shows a general legislative purpose to provide in cases where offices are to be filled by an appointment by one official and confirmation by another body, that vacancies occurring in such offices shall be filled in the same manner. An illustration may be found in the same chapter of the statutes now under consideration, where it is

1914.]

Huron County.

provided in Section 4359, General Code, that vacancies in the board of trustees of public affairs shall be filled by the mayor for the unexpired term, subject to confirmation by the council. Another illustration may be found as to state offices in Section 12, General Code, in which it is provided that vacancy appointments made by the governor are to be subject to the advice and consent of the senate. Numerous other illustrations may be found in the statutes but these two will suffice.

It is allowable in case of ambiguity in a statute to examine the history of legislation on the subject and to consider the results which would follow a literal interpretation of the language used. See *Slingluff v. Weaver*, 66 Ohio St., 621.

If a vacancy appointment to the office of street commissioner required no confirmation by the council, then an unscrupulous mayor could easily keep one of his creatures in office despite the opposition of the council. Such an appointee would hold under the statutes, until his successor should be appointed and qualify, and by refusing to make any other appointment, such appointee would continue in office indefinitely. We do not mean by this to criticize the action of any official in the present case or any person named as an appointee, for it does not appear from the record that any of them have been actuated by improper motives. What has been said was merely to illustrate the dangers that might arise if the construction contended for should be adopted.

It is not to be presumed from the language of Section 4363, General Code, that the General Assembly intended such a situation to arise. The section should rather be interpreted in the spirit suggested by Williams, C. J., speaking for the court, in the case of *City of Cincinnati v. Connor*, 55 Ohio St., 82, 89, in which that eminent jurist uses this language:

“It is an equally well established rule, that the provisions of a statute are to be construed in connection with all laws *in pari materia*, and especially with reference to the system of legislation of which they form a part, and so that all the provisions may, if possible, have operation according to their plain import. It is to be presumed that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious, in its several parts. And where, in

a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy. And it is only when, after applying these rules in the endeavor to harmonize the general and particular provisions of a statute, the repugnancy of the latter to the former is clearly manifest, that the intention of the Legislature as declared in the general language of the statute is superseded."

The statute in question in the case at bar is fairly within the terms of the language of the Supreme Court in *Doyle v. Doyle*, 50 Ohio St., 330, where the Supreme Court say that what is plainly implied in the language of a statute is as much a part of it as that which is expressed.

We hold that the appointment of a street commissioner to fill a vacancy requires confirmation by the village council the same as an appointment for a full term.

The petition of the relator will be dismissed.

ACTION TO ENJOIN ISSUING OF EXECUTION.

Court of Appeals for Lucas County.

ALFRED H. WITTSTEIN V. WELLINGTON T. HUNTSMAN, CLERK.

Decided, June 2, 1913.

Execution—Clerk of Court Can Not be Enjoined from Issuing, When—Remedy of the Defendant Ample at Law.

Injunction against the clerk of the court of common pleas to prevent him from issuing an execution to the sheriff of the same county, will not lie, in the absence of fraud, conspiracy or circumstances showing unfair advantage in issuing such execution, the remedy at law by application to the court from which the execution issued, to have it set aside, being ample.

Calkins & Storey, for plaintiff in error.

Charles M. Milroy, Prosecuting Attorney, and *Lewis E. Mal-low*, contra.

1914.]

Lucas County.

RICHARDS, J.; KINKADE, J., and CHITTENDEN, J., concur.

Error to common pleas court.

In the common pleas court Wittstein brought an action against the clerk of that court to enjoin the issuing of an execution which he averred the clerk was about to issue for the purpose of collecting certain costs. The amended petition was met by a demurrer filed by Mr. Huntsman, which demurrer was sustained by the common pleas court and the plaintiff not desiring to plead further, a final judgment was entered dismissing his petition, from which judgment he prosecutes error in this court.

It appears from the averments of the amended petition that Wittstein was the owner of an interest in certain real estate in the city of Toledo, which property was involved in litigation relative to the collection of an assessment for the construction of a sidewalk and that in said litigation certain costs were taxed against him and in favor of the sheriff, witnesses and notary public, but that no personal judgment for costs was rendered.

The final judgment was rendered in that action on April 20, 1887, by the circuit court of this county, the case having been taken to said court by appeal. It is averred, and of course admitted by the demurrer, that no execution was ever issued in said case. The plaintiff contends that by reason of the lapse of nearly thirty years without any proceedings being taken to collect costs due to the sheriff, witnesses and notary public, that no right to issue execution exists, and he asks that the clerk of courts be enjoined from taking such threatened action.

The case has been presented to us solely for the purpose of determining the power of the clerk of courts to issue such execution, no question being made as to the propriety of the remedy by injunction. We regret that the view we take of the case renders it not only unnecessary but unwise to undertake to determine the question sought to be made, for such a determination would be mere *obiter dictum*. We are clearly of the opinion that injunction is not the proper remedy. The execution which it is said is about to be issued is upon a judgment or order entered in this county and against a party resident in this county, the execution to be directed, of course, to the sheriff of this

county. Under such circumstances it is manifest that if an execution should issue, it would be entirely under the control of the courts of this county and plaintiff would have a remedy which would be entirely adequate in law by motion to direct the clerk to recall the execution. The amended petition in this case, of course, alleges that plaintiff has no adequate remedy at law, but the allegation is a mere conclusion and must be taken in the light of the well known principle that the officers of the court may be controlled by the court by motion on proper application made. If the amended petition contained appropriate averments of fraud or conspiracy or made a showing of an execution to be issued to a foreign county, a different question might be presented.

We call attention to the case of *Miller v. Longacre*, 26 Ohio St., 291. In that case an execution had been issued to the sheriff of Union county from the Common Pleas Court of Marion County, and even under those circumstances it was suggested that the more appropriate remedy would have been to apply to the court from which the execution issued to have the same set aside. The Supreme Court, speaking through Judge White, held that the objection that there was an adequate remedy at law came too late and for that reason, as well as for the reason that it issued from a foreign county, the remedy by injunction was sustained. The case to which attention has just been called has been cited with approval in *Darst v. Phillips*, 41 Ohio St., 514, 518, and it is there said that in many cases the nature of the relief required and the necessity of additional parties may be such that an original action by injunction is indispensable. The circuit court in Cuyahoga county in the case of *Krinke v. Parish*, 9 C. C., 141, sustained an injunction in a proceeding somewhat similar to the case now at bar, but it appeared in that case that the petition for the injunction to stay a sale on execution was filed only three days before the sale was to take place, for which reason the remedy by motion to set aside the execution would have been inadequate. As a matter of fact the case was not in reality heard until a considerable period of time after the date at which the sale was advertised to take place, and under such circum-

1914.]

Lucas County.

stances it is clear that the remedy by motion would have been no remedy at all, and that therefore injunction was properly held to be the remedy to which plaintiff was entitled. The general principle is entirely in accord with the rule as indicated that under ordinary circumstances injunction is not the appropriate remedy. See *1 Black, Judgments*, Sections 361 and 362.

The only defendant in this action is the clerk of courts of this county. The issuance of the execution would be for the benefit of other persons who are claimed to be entitled to the costs. We think it improper practice to bring an action in injunction against an officer of the court under such circumstances. If an injunction would lie the proper parties defendant would not be an officer of the court but the persons at whose instance the execution is about to issue. This court will not, under such circumstances, entertain an injunction against one of its officials. If the parties interested in obtaining such an execution should be enjoined that injunction would operate upon such parties and through them upon all the officers of the court set in motion by such parties.

We call attention to the following cases: *Olin v. Hungerford*, 10 Ohio, 268; *Allen v. Medell*, 14 Ohio, 445; *Howard v. Levering*, 8 C. C., 614.

It is well said in 2 High, Injunctions, Section 1551, that it is not proper to join as defendants in such action merely ministerial officers of the court such as the clerk who issues the process or the sheriff who serves it. they having no interest in the subject-matter in controversy.

For the reasons given we think the court of common pleas committed no error in sustaining the demurrer to the amended petition and in dismissing that petition. The judgment of the court of common pleas will be affirmed.

CROSSINGS OF ELECTRIC AND STEAM RAILWAYS.

Circuit Court of Huron County.

**AKRON & CHICAGO JUNCTION RAILROAD COMPANY v. SANDUSKY,
NORWALK & MANSFIELD ELECTRIC RAILWAY COMPANY.**

Decided, 1906.

*Railroad Crossings—Policy of the Law with Reference to—When an
Overhead Crossing Will be Ordered—Apportionment Between Elec-
tric and Steam Railways of Cost of an Overhead Crossing.*

1. It is the policy of the statutes providing for the manner of one railroad crossing another to require crossing other than at grade, where practicable from an engineering point of view and reasonable as a business proposition; and where an electric road seeks to cross a steam road and an overhead crossing is, under all the circumstances, practicable and reasonable for both companies, a crossing of that character will be ordered.
2. In apportioning the cost of an overhead crossing between an electric railroad company and a steam railroad company, the steam company where first established, should be made to share the cost of constructing only that part of the crossing that is necessary to provide a way and support for the tracks of the crossing railroad; the cost of ties, rails, ballast and the like must all be borne by the company crossing the older line.

Arrel, Wilson & Harrington, R. G. Craig and W. Severance,
for plaintiff.*S. M. Young, contra.*

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

This matter comes into this court by way of appeal. An application was made to the court of common pleas by the Akron & Chicago Junction Railroad Company, under an act (97 O. L. 548; Revised Statutes, 3333-1; General Code, 8834), entitled "An act to amend Section 1, of an act entitled 'An act to provide for one steam railroad's crossing another steam railroad,' passed May 10, 1902, relating to the crossing of railroads" to require that the crossing over its railroad proposed and designed by the

Sandusky, Norwalk & Mansfield Electric Railway Co. should be made otherwise than at grade crossing.

From the order or judgment of the court of common pleas an appeal has been taken to this court, and we have heard the testimony of the witnesses pertaining to the reasonableness and practicability of the mode of crossing otherwise than at grade; we have also heard the arguments of counsel upon the matter and have also viewed the location of the proposed crossing.

It may be thought since we have arrived at a conclusion in the case very soon after the arguments were closed, that we may not have given the case as full consideration as it merits; but I may state to counsel and parties interested that we have had the matter under consideration ever since the case was opened to us and Judge Haynes and myself have had it somewhat under consideration ever since the matter was presented to us at chambers at Toledo, some time ago. We feel that we are about as well informed as to all the circumstances that should be taken into consideration as we would be if we should give the matter more extended consideration.

The railway company makes this application as the owner and operator of a steam railroad. At the point in question it has double tracks, and it appears from the testimony that it designs to have four tracks some time in the future; that the road is doing a great deal of business and that its business is rapidly increasing. Without doubt it is at the present time (saying nothing of the purpose for the future) a main trunk line, and at this point many trains are run over its road, some of them at a high rate of speed; this point lies not very near to any village, upon a straight piece of track and a high rate of speed may be attained.

On behalf of the company it is insisted that it would interfere materially with its traffic and with its operations if a grade crossing were established here, and that such a crossing would be likely to result in expense to it and in damage to the traveling public, both those traveling over its line of railroad and those traveling over the line of the electric railroad. It is proposed by the electric road to cross the steam road at this

point at right angles. The electric road is now constructed over a distance of about twenty-five miles and it is designed to be extended. It is said that its purpose, when it is fully constructed, when it has completed this crossing, is to run in the neighborhood of thirty cars per day. It appears that the steam railroad runs from forty to sixty trains per day over its line of road at this point.

From this brief statement of facts, it will appear that this will be a very important crossing of the railroads, and one where we think that even if the greatest precautions were observed by all the parties operating upon either line, accidents would be very likely to occur.

In applying this statute and in construing it, we feel that we should have in mind and in force the evident legislative policy of the state, as manifested not only in this statute, but in a number of other statutes upon the statute books of the state *in pari materia*; and it is very plain that that policy is to avoid in the future, as far as reasonable and practicable the construction of additional grade crossings, and to do away with grade crossings that are at present in existence.

The statutes to which I refer, other than the one applicable to this case, are found in Revised Statutes, 3337-8 to 3337-17 (General Code, 8863-8873), and another statute of like character, Revised Statutes, 3337-17*a* to 3337-17*h* (General Code, 8874-8892), and the statute passed on April 25, 1904 (97 O. L., 546; Revised Statutes, 5332; General Code, 11605 *et seq.*), entitled "An act to provide how railroad and highway crossings may be constructed."

Under this statute applicable to this case; it devolves upon the court to ascertain, determine and define by its decree, the mode of crossing which will inflict the least possible injury upon the rights of the company owning and operating the road which is intended to be crossed and if, "in the judgment of said court, or said judge, it is reasonable and practicable to avoid a grade crossing, it shall by its process, prevent a crossing at grade."

It is obvious that the mode of crossing that would be the least injurious to the company making this application would be some other mode than a grade crossing; that a grade crossing, in other words, would be the most injurious mode of crossing to that company.

It is urged, however, that it does not necessarily follow that such crossing would interfere with absolute rights of the company; that the rights of the company to that part of its road not to have it crossed, are not of that high degree, or not of that character that should receive great consideration in opposition to the project and rights of the electric railroad company; that its right, in other words, to operate its line of railway over the country, is subject to the rights of the public as represented by other public service corporations to cross over its tracks.

We agree that the statute, in speaking of the rights of the company whose road may be crossed, has in view rights which are not absolute, but which are qualified in the manner already suggested by counsel.

We have to consider, under the evidence, whether another mode of crossing is practicable, and as we understand the testimony of the engineers, as an engineering proposition—as a physical question—the practicability of an overhead crossing at this point is beyond question. It may be done, and that, we think, is all that is intended by the word “practicability” in this statute. But, as we understand the statute, such a crossing is not to be required unless it is reasonable as well as practicable; so we have to consider the question of the reasonableness of such requirement.

It seems to us that the main question here is, whether as a business proposition it is reasonable to require this of the company, which has invested or which purposes to invest its money in this project. We have discussed this and we have taken into consideration in this connection the cost that would devolve upon the electric road of maintaining a grade crossing at this point.

It is clear from the evidence that the actual cost to the electric road of maintaining a grade crossing at this point would be

about \$500 a year, certainly not much less, and perhaps not a great deal more than that. Taking that into consideration and taking the loss of power which has been testified would result from the starting or the stopping of cars and the starting of cars again, as they are required to do at grade crossings, the delays incident to such stoppages, and to observe whether trains are coming and to wait for trains, if they happen to be coming, and the possibility—to put it no stronger—of loss resulting from accidents from collisions at crossings, we think it would be reasonable, as a business proposition, for this electric railroad company to build an overhead crossing at this point, even if the whole expense of it should fall upon the electric company.

On the other hand, taking it from the point of view of the steam railroad, the slowing down that would be required in the operation of their trains, the breakages that would occur to wheels, as has been testified to, from the running over these frogs, the hindrances that would result when it became necessary to repair and replace the frogs, and the responsibility of the company for disastrous accidents, that would not be unlikely to occur and result in great loss to the railroad company, we think, as a business proposition, that this overhead crossing should be constructed, even though every dollar of cost should fall upon that company. Certainly then, we conclude that, if the cost is to be equitably divided so that the whole cost shall not fall upon either, as to both it is reasonable that this overhead construction should be made. Such a crossing should not be required, if the grade the electric company would be required to establish would exceed the maximum grade of the company crossing; and it is made clear by the evidence here that this would not be so; that this crossing may be made at a grade not to exceed 3 per cent. The electric railroad has grades upon its line exceeding 3 per cent.—grades that it has voluntarily established—and other grades running up to 6 per cent. and perhaps seven per cent.—at least 5 or 6 per cent.—where it is running over village streets upon grade established by the municipality. Neither should it be required, if it would result in the tracks being put below high watermark. It is clear from the evidence that that would

not result here; so that we see no hindrance by the intervention of anything provided for in the statute to the ordering of this overhead crossing. We have not discussed the matter of any other mode of crossing; that is to say, a crossing going under the steam railroad, because it seems to us that, if it is practicable at all, it is not so practicable as an overhead crossing.

The statute requires that the court shall, in its order, equitably apportion the initial expense of such construction or crossing, with the expense of maintenance thereof, among the parties interested.

Before coming to that, however, I should say something about another matter that is urged upon our attention, and that is, the probable results to the traveling public using the highway, the roadway being one of the principal highways of the county across this steam railroad at about the same point, also at right angles; in other words, the right-of-way of the electric railroad is immediately to the east of and parallel with the highway, and it is said that the construction of such an embankment as will be required here to carry the electric road over the steam road will result in so obstructing the view of persons traveling along the public highway—obstruct their view of the railroad to the east—as that it will endanger them and endanger trains; and *vice versa*, that it will obstruct the view of the enginemen upon trains to the east of the embankment—obstruct their view of the highway and of passengers thereon.

This is a matter worthy of consideration, to be taken into account, we think, under the head of the reasonableness of the requirement. But even then, we think the greatest good to the greatest number, the greatest interests involved, should be considered, and that so far as the public travel along the highway is concerned, we do not see but that this construction may be so made as to avoid the dangers apprehended by counsel; in other words, that the embankment need not be carried so far toward the right-of-way of the steam railroad as to prevent a fair view of the railroad to the east by persons along the public highway within a reasonable distance of the railroad, so that if there were any danger to be apprehended, they might observe it before

coming upon the railroad; and so that enginemen to the east of the embankment on trains passing westward might not have their view of the highway materially obstructed.

Our conclusion is, that an overhead construction should be required; but we are not prepared to set forth in a decree precisely what that overhead construction shall be. We think that the embankments and abutments should not be carried nearer than twenty-five feet of the right-of-way of the steam road; in other words, that there should be open spans covering the distance over the right-of-way, which is one hundred feet, and twenty-five feet beyond, on each side, which would make it one hundred and fifty feet. The central span should be sixty feet to admit of a four-track construction, if the steam railroad should so desire, so that it might be done without tearing down this construction or interfering with it. That would make necessary forty-five feet, I believe, in each of the other spans.

Just how those spans should be constructed, the weight of iron and the weight of steel, or the exact form of construction, we are not prepared to say—we are not prepared to set forth in a decree. We think that ought to be arrived at by agreement of the parties; that they ought to be able to come together upon the subject; if they are not able to do so, however, the court will take to its aid an engineer and have plans prepared, but that is an undertaking the court does not desire to enter upon, as it would be obliged to trust entirely to the judgment of engineers, and we think it would be better, if possible, to have it done by the parties interested.

We conclude, taking into consideration the advantages to result to each party, their rights in the premises as public service corporations, the interest of the public and all, that the cost should be divided as provided in like cases by the statutes; that is to say, that each party should bear one-half of the expense of this construction. This, however, is not to include the cost of ties, rails or ballast, or anything of that sort, and is not to include the cost of land for supporting the embankment or damages to abutting landowners. We think the electric railroad company should procure its own right-of-way; that what the

1914.]

Huron County.

statute contemplates here, is the cost of construction of such crossing, not the cost of the right-of-way.

Now, unless the parties can agree upon the amount of the cost to be divided in this way, and upon the form of construction, the court will have to take to its aid, as before stated, an engineer and other competent persons to arrive at it, and then declare it. We think they should also be able to relieve the court of the burden of determining the manner or time of payment; and unless it is done by the parties the court will have to do it.

In view of the fact that the cost of maintenance will be inconsiderable—will be very light indeed, as compared with the cost of maintaining a grade crossing by the electric road—we conclude that, if the steam road bears one-half of the initial cost, that should relieve it from any further burden with respect to this crossing; and we also conclude that the cost of this inquiry should be divided equally between the parties.

It should be understood that this decision at which we have arrived is not a settlement of the whole controversy which may arise between the parties; in other words, that it is subject to the rights of the steam railroad to deny a crossing to the electric railroad until they shall acquire their right by appropriation proceedings. The Constitution requires that an appropriation of property shall be made and that the costs assessed by a jury shall be paid, before one may enter upon the property of another; and this statute, if it undertook to do away with that provision, would be, of course, unconstitutional. But if such form of construction is made as we have described, and as we shall order, we think it proper to say now—what we may possibly be required to say some time in the future—that we can not see why the steam railroad should have more than nominal damages for the crossing.

We can not, as we understand the law, give the right for a temporary crossing; we can not give the right to any crossing; we can not give the electric railroad any right to cross overhead, underneath, or any way at all: we can only determine how they shall cross when they have acquired the right to cross.

We will hold the case open for a reasonable time to give the parties an opportunity to agree upon plans.

We think the control of the construction should be in the hands of the electric railroad company. It is their road; it will be their bridge, or their crossing.

Another matter that has occurred to us is, that it is a matter of indifference to the steam railroad what the grade of this bridge shall be, only so that the height required shall be attained. It may be, that the electric railroad company shall prefer to make the bridge more abrupt and not have the grade 3 per cent., but have it 4 or 5 per cent. In that case there would be less cost—less cost would fall upon them and less cost would fall upon the steam railroad. That, however, will be a matter for them to consider. The court would not require them to build it at a grade exceeding the 3 per cent.

We shall treat this as our final judgment and we shall have the journal speak as of today. If the parties do not agree, we shall get the information required of us in the best way we can, and use it. We do not understand that in cases of this kind, we are required to sit in court as upon a regular trial of an ordinary law or equity case. We might have proceeded in the case without calling a single witness if we had chosen to do so.

The restraining order will remain in present force. The order should be modified, however, if necessary, so as to allow the electric road to proceed in condemnation.

1914.]

Hamilton County.

**CLASSIFICATION OF EMPLOYEES UNDER THE
CIVIL SERVICE.**

Court of Appeals for Hamilton County.

STATE, EX REL EDWARD MUGAVIN AND WILLIAM S. BOYD, v.
EDWARD S. KEEFER ET AL, CIVIL SERVICE COMMIS-
SIONERS FOR THE CITY OF CINCINNATI.*

Decided, October 24, 1914.

*Civil Service—Determination as to Whether a Valve-man is a Skilled
or Unskilled Laborer—Status Where Unskilled Laborers Hold
Over More Than Twelve Months Without Examination.*

A valve-man employed in the municipal service under the former civil service law was in the unskilled class, and his appointment by the director of public service was legal and he became an "incumbent of the place" under the present act, and is entitled to remain in the position and to receive pay for his services, subject to his successfully passing a non-competitive examination when called upon to do so by the commission.

Nelson & Hickenlooper, for plaintiffs in error.

Walter M. Schoenle, City Solicitor, and *Chas. A. Groom*, Assistant City Solicitor, contra.

JONES, E. H., J.; JONES, O. B., J., concurs; SWING, P. J., not sitting.

This is an action which involves the construction of the so-called civil service act passed by the Eightieth General Assembly of the state of Ohio and found in Volume 103 of the Ohio Laws at page 698. The action is one for mandamus, the prayer being, in effect, that the defendant civil service commission for the city of Cincinnati be required by the court to certify to the payroll containing the names of relators, under Section 21 of said act.

The facts with regard to the two relators are not identical. It is conceded that the recent decision of this court in the case

*Reversing *State, ex rel Mugavin, v. Keefer et al*, 12 O. L. R., 204.

of *Keefer et al, Civil Service Commissioners, v. State of Ohio, ex rel Fitzgerald, ante*, disposes of the questions raised on behalf of the relator, William S. Boyd. We find, from an examination of the record, that such is the case, and a peremptory writ will issue in favor of Mr. Boyd on the authority of the case above referred to.

Edward Mugavin was appointed, or employed, by the director of public service as a valve-man, under a former civil service law which was repealed by the enactment of the present law. Under the former law "unskilled laborers" were not in the classified service. The rules adopted by the civil service commission under that law classed valve-men as unskilled laborers and not falling within the provisions of the civil service act. It is contended that this classification is incorrect and that the duties of valve-men are such as to require skill and experience. and that valve-men should be classified and are not within the purview of the word "unskilled." It is further contended that if this view is correct, then the director of public service had no authority to appoint Mugavin to the position or place which he fills.

With this contention we can not agree. There is no dispute between counsel as to the duties of valve-men and as to the nature of the work which they are required to perform. Upon the agreed statement, in argument, or what these duties are, we are clearly of the opinion that the labor is such as is designated as "unskilled" by the civil service act in force at the time of Mugavin's appointment, said work requiring no special training, practical experience, or apprenticeship. Having reached this conclusion, it follows that his selection or appointment by the director of public service was legal, and that at the time of the taking effect of the act under consideration he was an "incumbent of the place" under the meaning of Section 10 of said act.

It is further contended that even if such be the case he is not now entitled to hold the position or to any compensation for labor performed in such position since the 8th day of August of this year, for the reason that on said date the twelve months

1914.]

Hamilton County.

period within which he would be subject to a non-competitive examination had passed, and no examination has been taken by him. In this connection it is conceded that no such examination has been held by the civil service commission. It does not appear why this apparently liberal time has been allowed to pass without an examination but there is no intimation, nor indeed can there be any, that Mugavin or any other employee of the city is responsible for this delay.

We believe that the reasonable construction of the last paragraph of Section 10, which contains this limitation of twelve months, is to hold that should the commission for any reason delay the non-competitive examination beyond the time prescribed, it must be held at the earliest time practicable, and that until such time the employees holding over as incumbents of "offices or places" at the time of the taking effect of the act, would continue to hold their places. If the examination is unreasonably or unnecessarily delayed by the commission, the proper remedy would be to proceed against the members in the way provided by statute for compelling officers to perform the duties imposed upon them by law.

Under the undisputed facts in this case as disclosed by the record, we find that the law supports the claim made by counsel for Mugavin, and that he is entitled to remain in his position and receive pay for services rendered, subject to his successfully passing a non-competitive examination when called upon to do so by the commission.

The judgment will be reversed, and judgment given here for both of the relators, plaintiffs in error. Writ of mandamus to issue.

**DISCRIMINATION BETWEEN SHIPPERS IN THE MATTER
OF SIDE-TRACKS.**

Circuit Court of Franklin County.

QUINN COAL CO. V. HOCKING VALLEY RAILWAY.

Decided, January Term, 1905.

Railways—Equal Facilities Must be Furnished All Shippers—Discrimination—Injunction.

Where a railroad company, operating as a common carrier of freight, adopts as a part of its business policy any advantageous facility for handling its freight, such as laying side-tracks and making switch connection for coal shippers whose mines are located along its line of road, it must not discriminate between different shippers with respect to such facility, but must afford it equally to all; and injunction will lie to prevent such discrimination, and to compel an equal service to all.

M. B. Earnhart, for plaintiff.

J. H. Hoyt, Doyle & Lewis and C. D. Hunter, contra.

DUSTIN, J.; SULLIVAN, J., and WILSON, J., concur.

Plaintiff commenced its action by filing the following petition, to-wit:

"The said plaintiff is a partnership formed for the purpose of doing business in the state of Ohio under the name of the Quinn Coal Company, and is engaged in the business of mining and selling and shipping coal, and in pursuance of its purpose and business has purchased and now owns in Wilkesville township, Vinton county, state of Ohio, a tract of 150 acres of coal lands underlaid with two veins of four and one-half foot coal, the said lands lying along and adjacent to the said defendant's main line of railway and right-of-way in said township, and upon the west side of said right-of-way.

"The said defendant is a corporation duly organized under the laws of the state of Ohio and as a railway corporation, for the purpose of operating a railway, and is so operating a railway, and moving freights between the city of Toledo, a municipal corporation of said state and the village of Pomeroy, a village of said state, its right-of-way and transportation of freights

and passengers extending across said state and through said township and county, defendant being a common carrier of freight and passengers for hire over its said line and connected with, and transporting its freight and passengers over other railway lines.

"The said defendant along its right-of-way, and adjacent to said plaintiff's land, has constructed, and now maintains and operates, a side track or spur track, west of its main track, of the length of about 150 feet and said side track is used by the general public for the transportation of coal, lumber or other materials or products, and is now so used, the said main track and spur or side track along said plaintiff's premises running northward and southward, but the grounds of said company and those west of and adjacent to said side track are so raised and elevated that not to exceed two cars can be loaded at one and the same time, and said side track opens or is connected with the main track at a point east and opposite the plaintiff's lands, the said lands not extending but some few feet north of said point where said side track connects with said main track, the said side track connecting with the main track at its south terminus opposite the plaintiff's lands and extending northward about 150 feet.

"Said plaintiff has opened said lands and mines at a point almost immediately west of said connection of main and side track and is able to ship two or more cars a day from said mine and is desirous of so doing, and has contracts with a firm called Maynard Bros. of Columbus, Ohio, on the line of said railway, and the Columbus Railway & Light Company requiring the shipment over said line of from one to two cars daily.

"The plaintiff says that said side track can be extended southward 200 feet upon said plaintiff's lands or said defendants right-of-way without any injury to or interference with said main track or other property of said company.

"The plaintiff says it has opened its mine and has prepared for a tippie for the coal mined therefrom at a point about one hundred feet south of the south end of said side track, at which point by the aid and use of the tippie it can, without loss or danger or injury to said defendant's right-of-way or main track, load and transport its said cars.

"The plaintiff says by the said side track as now used by the defendant it is compelled in mining and transporting its coal to load the same in wagons, haul the same to said siding, and then load the same into the cars of said defendant company, and is often hindered and delayed in this by reasons of others, persons, firms and corporations, using said side track.

"The plaintiff says there are many mines along said defendant's right-of-way and that thousands of tons of coal are shipped therefrom; that the defendant company has placed sidings and tracks for their mines or their owner for the use of the coal operators, in shipping coal, these mines having lines, or side tracks, used only by the coal operators owning mines adjacent thereto, and these various coal operators having tipples from which to unload their coal into the cars of the defendant company, the company setting in its cars and receiving the coal from these side tracks and tipples.

"The plaintiff says that by reason of the hauling by wagons its said coal, said present short track and said raised land, and by reason of each of said facts, the expense of hauling its coal is very great. The plaintiff says that the unloading from tipples into cars is the common and well known method pursued by said company for its coal traffic and is safer, easier, less expensive and more expeditious and the said siding or side track as now permitted and used, does not give equal or reasonable facilities for loading coal, and is an unjust discrimination against plaintiff.

"The plaintiff has requested said defendant to extend its said side track southward 200 feet and agreed to build, construct and maintain the same at its own expense but subject to the control, supervision and requirements of said defendant, the plaintiff under like supervision to make all required connections with said main track without increased danger or connections with said main track and to pay all costs, but said defendant refuses so to do or to permit the plaintiff so to do.

"The plaintiff says the defendant is the only railway by which it can transport its coal, and that it is denied the proper facilities for shipping its coal or those granted and extended by said defendant to the other coal operators similarly situated along said right-of-way, and if said side track was extended and said connections made with said main track at the north end of said track as now located the cars could be more readily moved, as the grade is southward in slope, and if said extension was also made the plaintiff would be given facilities to operate its said mine, and similar or equal facilities given to the other coal operators upon the line of the defendant's railroad.

"Plaintiff says if the said facilities are not given, it is delayed, hindered and deprived of the proper use of its said property, and it suffers great and irreparable injury thereby, that can not be properly measured in any action at law.

"Wherefore, the said plaintiff prays said defendant by the orders and judgment of this court extend its said side track,

1914.]

Hamilton County.

and keep or make the proper connections with its main track; that it be required not to discriminate in the condition of loading.

"That said plaintiff be allowed to load its cars from a tipple or other safe, usual or convenient mode upon said side track so extended, and for such other order in the premises as will prevent hindrances, delays and discriminations that are exercised against this plaintiff and not against said other coal operators, and other proper relief."

A demurrer to the petition is filed, based upon the grounds that it does not state a cause of action against defendant, or that if it does, plaintiff has an adequate remedy at law.

The demurrer to this petition will be overruled, on the authority of *Johnson Coal Min. Co. v. Railway*, 1 N.P.(N.S.), 385.

APPROPRIATION FOR HIGH SCHOOLS BY TOWNSHIP BOARDS.

Circuit Court of Hamilton County.

STATE, EX REL NORTH BOND VILLAGE SCHOOL DISTRICT, v. MT. NEBO SPECIAL SCHOOL DISTRICT ET AL.*

Decided, February 5, 1907.

Schools—Township Board May be Compelled to Make Appropriation for High School—Limit of School Levy.

1. A township board of education may, under Section 4009-15, Revised Statutes, which provides for the establishment and maintenance of joint township high schools, be compelled to appropriate its proportionate share of expense of the maintenance of such school from the tuition or contingent fund provided for by such section; but it can not be compelled to make the appropriation from a levy made for a subsequent year.
2. The levy, under Section 3959, Revised Statutes, for all school purposes, is limited to twelve mills, and if the estimate and certificate of the board of education is insufficient the remedy is by application to the county commissioners under Section 3969.

*Affirmed by the Supreme Court without opinion, *State, ex rel, v. Mt. Nebo Special School District*, 76 Ohio State, 637.

Louis A. Ireton, W. R. Collins, W. M. Schoenle and G. T. Poor,
for plaintiff.

H. J. Buntin, contra.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

We find no constitutional or other infirmity in Section 4009-15, Revised Statutes, which provides that:

“The funds for the maintenance and support of such high school be provided by appropriation from the tuition or contingent funds; or both, of each district, in proportion to the total valuation of property in the respective districts, the same to be placed in a separate fund in the treasury of the board of education having control of the school * * * but only for the purposes of maintaining said school.”

Hence it was the duty of the board of education of the defendant school district, if it had sufficient funds in the treasury during the year ending September, 1906, to appropriate from the tuition or contingent funds, or both, its proportionate share for the maintenance of such school; but it can not be compelled to appropriate the same from funds derived from the levy made for subsequent year, unless it can be done without impairing the general school fund or the efficiency of the common schools.

The levy for all school purposes is limited by Section 3959, Revised Statutes, to twelve mills on the dollar of valuation of taxable property of district, and if the board of education failed to estimate and certify a sufficient amount within the limit, the remedy was an application to the county commissioners under Section 3969, Revised Statutes.

Upon the facts in this case, we think the relator not entitled to a writ of mandamus, and the petition will be dismissed.

1914.]

Hamilton County.

**WHERE A LOSS MUST FALL UPON ONE OF TWO
INNOCENT PARTIES.**

Court of Appeals for Hamilton County.

THOMAS L. EVANS V. JAMES P. VAUGHAN ET AL.

Decided, March 4, 1914.

Promissory Note—Made Payable at an Attorney's Office—Is Paid to the Attorney Who Absconds—Maker and Payee both Innocent of Intentional Wrong—Determination as to Whose Carelessness was Responsible for the Loss—Agency—Evidence.

1. Where a promissory note is made payable at the office of an attorney and the maker and payee never meet but the amount of the loan was handed to the maker by the attorney in question, and for several years the maker paid interest on the note to the attorney and finally paid the principal upon the promise of the attorney to send him the canceled note, which was not done but the attorney thereafter absconded, a finding by a jury under proper instructions that as between the two innocent parties the carelessness of the payee was responsible for the loss will not be disturbed by a reviewing court.
2. In such a case it is not error to exclude the answer of the payee as to whether he authorized the said attorney to collect the principal of the note.

Overbeck, Kattenhorn & Park, for plaintiff in error.

G. C. Wilson, contra.

JONES, E. H., J.; JONES, O. B., J., concurs; SWING, J., dissents.

The action in the court below was upon a note for \$700 secured by a mortgage. The following is a copy of the note sued upon:

"\$700.00.

CINCINNATI, O., March 21st, 1905.

"Two years after date I promise to pay to the order of T. L. Evans, seven hundred dollars. Payable at the law office of J. E. Humphreys, Cin. O., value received with interest at 6 per cent. per annum payable semi-annually. Privilege given to pay all at end of one year.

(Signed) JAMES P. VAUGHAN."

The endorsements on this note showed payment of interest to September 21, 1910. The plaintiff asked judgment below for

the principal and interest from September 21, 1910, and also asked for foreclosure of the mortgage given to secure the payment of this note.

Defendant James P. Vaughan in his answer pleaded payment. The evidence showed that he had paid the semi-annual installments of interest as they became due, to September 21, 1910, at the office of J. E. Humphreys; that he had also paid upon the principal the sum of \$300 at the law office of J. E. Humphreys in Cincinnati, Ohio, on September 21, 1909, and paid the installments of interest as they became due upon the remainder of the principal; and that on November 10, 1910, he paid at the law office of J. E. Humphreys the sum of \$400 balance due on principal and also \$3 as interest, which, as he alleged, was all that was then due upon the note.

It is not contended by Mr. Vaughan that upon any of these occasions when he called at Mr. Humphreys' office to pay interest or principal, he saw the note. On the other hand, Mr. Evans, the payee of the note, testified that the note and mortgage were in his possession during all of this time. Mr. Vaughan says that on November 10, upon which date, as he thought, said note was fully paid, John E. Humphreys promised him to return properly canceled the note and mortgage. This Humphreys never did. The evidence shows that shortly thereafter he absconded, having failed to account to Mr. Evans for either the \$300 or the \$400 which were paid by Mr. Vaughan upon the principal. The evidence shows, however, that all the installments of interest, with the exception of the \$3 paid on November 10, 1910, were remitted to Mr. Evans by Mr. Humphreys, and that after the payment of the \$300 above referred to he continued to send remittances for interest the same as if said \$300 had not been paid, when in fact he was receiving, after such payment, interest upon only \$400 semi-annually. In other words, instead of paying the sum of \$12 as interest to Mr. Evans after September 21, 1909, which sum was the amount actually received by him, he sent to Mr. Evans the sum of \$21 as each installment of interest became due and payable, obviously for the purpose of concealing from Mr. Evans the fact that he had ever received the payment upon the principal.

1914.]

Hamilton County.

The action below was one for a personal judgment, and was tried by a jury. The question presented by the pleadings and the evidence was, which of two innocent persons should suffer by reason of the defalcation or embezzlement of this money by Humphreys.

The court charged the jury properly, as we think, in a special charge, as follows:

"If you find that both this plaintiff and defendant are innocent of any intentional wrong, but that the loss in question in this case must fall upon one of them, then I charge you that the one of them whose carelessness was responsible for the loss, must suffer the loss, if you find there was such carelessness."

The jury having found in favor of the defendants, it is but reasonable to conclude that under the charge of the court to the jury they found that the plaintiff had been guilty of carelessness, which carelessness had induced the defendant Vaughan to make the payments to Humphreys upon the note. Unless this finding is clearly against the manifest weight of the evidence and in the absence of any error in the charge of the court or in the admission or the rejection of material evidence, it follows that the verdict of the jury can not be questioned. The issue presented by the pleadings and submitted to the jury was one of fact to be determined solely by the jury on the evidence in the case.

We have read the record in the case very carefully in order to satisfy ourselves as to the evidence and the weight thereof as touching the respective claims of the parties. We can not say, after this examination, that the verdict of the jury is wrong.

It is contended by counsel for plaintiff in error that the question as to the position occupied by Humphreys in this transaction, viz., whether in receiving the sums paid upon the principal of the note he acted as the agent of Evans or as the agent of Vaughan, was one of law and should have been determined by the court. With this contention we can not agree. The action being primarily one for a money judgment is triable to a jury. The jury was entitled to hear all the evi-

dence material to the issue, and all that would in any way enable them to decide whether or not the defendant had paid the note as claimed in his defense. It became a question, therefore, whether Mr. Vaughan had merely taken his money to Mr. Humphreys' office and left it there in the custody of Mr. Humphreys with the request, express or implied, that it should be applied in payment of the Evans note, or whether he had paid it to Mr. Humphreys, warranted in believing from all the circumstances that he represented Mr. Evans as agent in the transaction and as such was authorized by Evans to receive the principal and interest.

The facts in the case in addition to those above stated are that although this note ran more than three years after it became due, the payee and holder thereof made no demand upon Mr. Vaughan at any time for the payment of the note and, so far as the evidence discloses, gave the matter no attention whatever. Mr. Vaughan and Mr. Evans had never seen each other before the trial of this case in the court below. The note stated on its face that it was to be paid "at the office of J. E. Humphreys, Cincinnati, Ohio." Vaughan was ignorant and unaccustomed to business affairs. The law is well settled that to make a note payable at a bank does not authorize the maker to pay the note at such bank and discharge him therefrom upon doing so, unless the bank at the time of payment has the note in its possession. Nearly all blank forms of promissory notes are printed so as to be made payable at some bank or financial institution, and little attention is usually given by parties to a transaction to the provisions of the note in this respect.

It seems to us to make a somewhat different situation where as in this case the words are inserted in the note making it payable at the private office of an attorney at law. This alone might not be important, but when it is borne in mind that the evidence in this case shows that Mr. Vaughan had never seen Mr. Evans; that Mr. Humphreys through an agent, Mr. Morton, was the one to whom he had applied for the loan; that the money was paid over to him by Mr. Humphreys; that he handed his note and mortgage to Mr. Humphreys who filed the latter for record; that he paid the interest for five years to Humphreys with the knowl-

1914.]

Hamilton County.

edge and without any protest from Evans; and, although the note was over three years past due when it was paid, which fact usually brings some protest or notice from the payee that he never received any notice, all these circumstances combine to induce a man such as Vaughan to look upon Humphreys as the agent of Evans for all purposes of the transaction.

Cases have been cited by both sides, and counsel for plaintiff in error rely upon the case of *Antioch College v. Carroll*, 25 W. L. B., 289, decided by Judge Taft. That case was tried to the court without the intervention of a jury, it being an equitable proceeding. It is needless to say that none of the cases presented by either side present the same state of facts as we find here. Such being the case, we should not be justified in discrediting the verdict of the jury in the case at bar, for the reason that it does not coincide with the views expressed in another case, where the facts are not identical, however able and distinguished might be the jurist who announced the opinion.

Some alleged errors are pointed out in the brief for plaintiff in error in the admission and rejection of evidence. One of these objections touches a vital spot in this case, and for that reason we shall refer to it briefly here. On page 48 of the bill of exceptions plaintiff was asked this question:

“Q. I will ask you whether you at any time authorized Mr. Humphreys to collect the principal of the note made by James P. Vaughan to your order in controversy in this case?”

An objection to this question was sustained and the ruling was excepted to. The court very properly stated, in passing upon this objection, that it was “what was said and done” that should be inquired into. The question, in the form in which it was presented, asked the witness to give his conclusions.

In order to bind Mr. Evans in this case by the payment to Humphreys it was not necessary that any express authority be shown as having been given by him to Humphreys, but authority might be implied from the acts of the parties. Such being the case, the court properly refused to allow the question to be answered.

This ruling upon the evidence involves in its legal aspect the question raised by an objection to the general charge of the court. The court charged the jury, in part, as found on page 57, as follows:

"Now an agent may be one who has authority to collect money, actual authority to collect or ostensible authority to collect it. Now ostensible authority to collect money is shown by the intentional acts between two parties, or by the want of ordinary care, causing the loss to a third person, and that would be Mr. Vaughan in this case, to believe Mr. Humphreys had a right to collect this money on this note and mortgage. If you find from a preponderance of the evidence, Mr. Evans either actually or ostensibly permitted Mr. Humphreys to act as his agent in collecting this money, that he did this intentionally or by want of ordinary care, or by his own negligence led Mr. Vaughan to believe and have reason to believe that Mr. Humphreys was his agent to collect the money, then Mr. Evans can not recover and your verdict will be for defendant."

The law is correctly, though somewhat imperfectly, stated in this portion of the charge. It is manifest, therefore, that the court below having in mind the principle here enunciated refused to permit Mr. Evans to answer the question above quoted as to whether he had ever authorized Mr. Humphreys to collect the principal sum of the note.

We think there was no error to the prejudice of the plaintiff in error here in any of the matters complained of in counsel's brief.

The jury, under proper instructions from the court found that Mr. Vaughan in paying the money to Humphreys regarded Mr. Humphreys as the agent of the payee and as fully authorized to receive the money.

We think it was only natural for a man of Vaughan's inexperience to be induced so as to believe and so to look upon Mr. Humphreys, from all the facts and circumstances in this case, and from the conduct of Mr. Evans himself. His silence for five years, and especially for the last three years when the note was overdue, would naturally tend to make Vaughan believe that the entire matter was in the hands of Mr. Humphreys with whom alone he had transacted the business so far.

1914.]

Hamilton County.

We do not say that Vaughan was free from any carelessness and negligence. It was his duty as a careful man to have held the payment of the principal of the note until credit was given thereon in his presence or until when final payment was made the note was surrendered to him, but it seems that the implicit confidence which Mr. Evans placed in Mr. Humphreys, who was a stranger to Vaughan, inspired a feeling of security and confidence in the latter.

The jury must have found, as before stated, that of the two innocent parties the negligence of Evans more directly contributed to the loss, and that therefore under the well settled doctrine of law he must be made to suffer.

Judgment affirmed.

SWING, J., dissenting.

There is no evidence in the case that shows that Evans ever constituted Humphreys his agent to receive payment of this note, and there is no evidence that tends to show that Evans in any way represented to Vaughan that he was so authorized, and the judgment therefore is not sustained by the evidence.

**A CLAIM OF AGENCY NOT INVOLVED IN A REPRESENTATION
AS TO BACKING.**

Circuit Court of Morrow County.

CITIZEN'S BANK OF CARDINGTON V. DAVID HIGH.

Decided, June 25, 1903.

Sales—Representations that Bank is Backing a Purchaser, Not a Representation of Agency.

Representation by a dealer that a certain bank is backing him in the purchase of hay is not equivalent to a representation that he is purchasing for the bank, and one who has sold him hay and taken his check in payment, can not upon the dishonor of the check, hold the bank as principal, merely because the dealer, when he shipped the hay, stated in the bill of lading that it was to the order of the bank and drew upon the consignee of the hay to the order of the bank for the purpose of securing his account with it.

WINCH, J. (sitting in place of Donahue, J.); VOORHEES, J., and MCCARTHY, J., concur.

David High brought this action against the Citizen's Bank of Cardington, a corporation under the banking laws of Ohio, alleging that the bank was indebted to him in the sum of \$117.17 for hay sold and delivered to it. The answer was a general denial.

Verdict and judgment being for the plaintiff below, the bank has filed its petition in error, urging that the judgment is against the law and the evidence of the case.

It appears from the bill of exceptions that in June, 1898, one John H. Pringle bought the hay in controversy from David High, who says that Pringle represented to him that he was backed in the hay business by the Citizen's Bank.

High says that Pringle virtually represented himself as an agent for the bank in the purchase of the hay, but Pringle denies this. The hay was delivered by High to Pringle at Ashley, Ohio, and put aboard the cars there for shipment to Cincinnati.

1914.]

Morrow County.

Pringle gave High his check on the Citizen's Bank, but it was never paid. High says the cashier of the bank afterwards practically told him that the bank had bought the hay, but the cashier denies this.

It appears that the railroad company, upon receiving the hay, delivered to Pringle its bill of lading, reciting among other things:

"Ashley, Ohio, June 17th, 1898. Received from J. H. Pringle by the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co." And the property is described below under "Description of Articles: one car baled hay, 20,000 lbs. Car, C. C. C. & St. L. 93, 117. Notify the Union Grain and Hay Co., Cincinnati, Ohio. Order, Citizen's Bank, Cardington, Ohio."

Pringle took the bill of lading and attached to it his draft as follows:

"Cardington, Ohio, June 17, 1901. At sight. Pay to the order of the Citizen's Bank, seventy-five dollars. Value received and charge to account of J. H. Pringle. To Union Grain and Hay Co., Cincinnati, Ohio."

There were several bills of lading and several drafts, but all are alike. Pringle delivered the bill of lading with the draft attached to the bank, which credited the amount of the draft to Pringle, with the understanding that his account was not to be checked against until the draft was paid.

The draft with bill of lading attached was sent by the bank for collection to its correspondent at Cincinnati, but the same was not paid. This is the reason the bank assigns for not paying Pringle's check to High.

To us this transaction, so far as the bank is concerned, appears to be a straight banking matter. It does not appear that the bank was buying and selling hay.

This delivery to it of the bill of lading did not amount to a constructive delivery to it of a consignment of hay. The bill of lading was attached to the draft as a direction and authority to the consignee of the hay at Cincinnati to pay the bank; and notice to the consignee that it should pay no one else but the bank. The words, "Order Citizen's Bank, Cardington, Ohio,"

directed the railroad company to respect any orders of the bank concerning the hay; and this because the bank was backing Pringle in business and desired to be sure of his honesty and fair dealing.

But backing another man in his business does not mean constituting him your agent for business that you are carrying on for yourself. To give this construction to the bank's part in the transaction is to harmonize it with its powers as a bank and the common transaction of banks with drafts.

We do not think that the case of *Hamet v. Letcher*, 37 Ohio State, page 355, furnishes any rule to be followed in this case.

In the Hamet case one Jacob O. Rhoner, representing himself as agent of O. T. Letcher & Co., buyers and shippers of hogs, bought hogs of Hamet, a farmer; and took the hogs to Letcher & Co., and sold them to said firm as his own and got the money for them. When Hamet applied to the firm for his pay he was told that they had paid Rhoner.

The farmer knew that Letcher & Co. were in the hog business and that is what distinguishes that case from this.

In the case High knew that an incorporated bank can not buy and sell hay. It is *ultra vires* for it to do so and he had no right to rely upon any statements Pringle may have made him, that he was agent for the bank.

Again, after the transaction, he had no rights against the bank growing out of any representations its cashier might have made to him as to the bank's being in the hay business. Any such representations, if they were made by the cashier, would not bind the bank. An agent of a corporation can not bind it to contracts beyond the powers of the corporation to make. Corporations act through their boards of directors; and no officer can bind a bank on a hay contract, such contract being clearly beyond the powers of the bank to enter into, as High knew, or should have known, before he sold the hay to Pringle. We find the judgment is against the law and evidence, and it is therefore reversed.

DETERMINATION AS TO WEIGHT OF THE EVIDENCE.

Circuit Court of Lorain County.

THE CLEVELAND ELECTRIC RAILWAY CO. v. MARGARET A. PIFER.

Decided, October 8, 1903.

Number of Witnesses Does Not Determine Weight of Evidence.

A judgment will not be set aside as being against the weight of the evidence in a case where the evidence is clearly contradictory and the jury must believe certain witnesses and disbelieve others, simply because it has believed the witnesses who were fewer in number; this is so especially when uncontradicted facts point toward the conclusion reached by the jury.

Squire, Sanders & Dempsey, J. P. Dawley and E. G. & H. C. Johnson, for plaintiff in error.

C. S. Bentley and Willis Vickery, contra.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Plaintiff in error has brought proceedings in error in this court to reverse a judgment for \$4,000 recovered against it in the court below as damages sustained by the defendant in error by reason of the negligence of the plaintiff in error in so managing one of its cars upon which the defendant in error was a passenger, that, as she attempted to alight therefrom, it started suddenly and she was thrown to the ground, permanently injuring her right wrist, spine and nervous system.

The accident happened at the corner of Wilson avenue and Wilson place in the city of Cleveland.

It is claimed that the verdict of the jury upon which the judgment was rendered was contrary to the manifest weight of the evidence, and that the trial judge erred in his charge to the jury, and in refusing to charge as requested by plaintiff in error.

As to the weight of the evidence: The plaintiff below claimed and so testified, that after the car had stopped at Wilson place, and while she was attempting to alight therefrom, it started with a sudden jerk and threw her to the pavement.

She was corroborated in her statement by Professor Swanbeck, a fellow passenger, who got off the car at Wilson place just a moment before she was injured.

On the other hand the conductor and three other passengers, two of whom were seated in the car and one standing on the rear platform when the accident occurred, testified that she stepped from the car before it came to a full stop.

Evidently the jury believed the plaintiff's story. Its probability is materially strengthened by the position she was in on the pavement after she had fallen thereto.

The car was traveling north on Wilson avenue. All the witnesses who testified on the subject agree that she lay on the pavement with her feet to the north and head to the south. She fell, then, in the direction from which the car came. This would indicate that the car was jerked out from under her after it had come to a stop. Such movement would pull her feet out from under her and she would fall backward. Were the car in motion when she attempted to alight, the momentum of the car would carry the upper part of her body forward when her feet became stationary by reason of contact with the ground, and in such case she would fall with her head to the north. Considering the probabilities as to whether the car was stopped or in motion when defendant in error attempted to leave the car, as deduced from her position on the pavement after she fell, we can not say that the jury was not warranted in finding the issue on this point in her favor, notwithstanding twice as many witness testified in favor of the theory of the railway company as testified for Mrs. Pifer.

Whether the jury was also influenced in reaching its conclusions and in believing or disbelieving many or few of the witnesses produced before it by their appearance upon the stand and manner of giving testimony we can not know, and for this reason also, we are reluctant to disturb the verdict, notwithstanding the testimony is conflicting.

As to the charge and requests to charge: the charge substantially covered all the counsel for the railway company requested and was entitled to.

1914.]

Lorain County.

Indeed, the charge in some respects was more favorable to the railway company than it was entitled to, the court defining negligence as the want of ordinary care and so intimating that the railway company had not been negligent if, under the circumstances of the case, it had exercised ordinary care, while the law is, that common carriers, as to their passengers, are bound to exercise the highest degree of care.

It is claimed that the court erred in commenting as it did upon the weight to be given to the number of witnesses produced upon either side. As before stated, witnesses for the railway company outnumbered the witnesses for the passenger two to one, and such benefit as the railway company should have obtained from this fact, it claims was destroyed by the following part of the charge:

“You are the sole judges of the weight to be given to the evidence and of the credibility to be given to the witnesses. You have the right to believe or disbelieve any witness. The weight of the testimony is not to be determined *necessarily* by the number of witnesses called on either side. The question remains for you to determine without regard to the number of witnesses, where the real truth lies. As you shall determine this question from the evidence under the rules given you, so should your verdict be.”

While some sentences in this part of the charge taken alone are open to criticism, the whole was not misleading or prejudicial.

In any event, in this case, as the testimony was conflicting, the jury had to believe some of the witnesses and disbelieve some, and the probabilities of the case, deduced from uncontradicted facts, to which we have heretofore called attention, doubtless influenced the jury to believe those witnesses, though fewer in number whose story was in accord with such probabilities.

We find no error complained of which would warrant a reversal and the judgment is therefore affirmed.

CONTRACT FOR SALE OF COAL LANDS.

Circuit Court of Perry County.

TIMOTHY O'FARRELL v. THE SUNDAY CREEK COAL CO.

Decided, November, 1903.

Specific Performance—Absence of Coal on Two Hundred Acre Tract Not Established by Two Borings—Failure to Perfect Title Does Not Defeat Action for Specific Performance.

1. In an action upon a contract for the sale of coal land, a defense that there was no mineable or marketable coal under plaintiff's land is not sustained by evidence that two borings on a two-hundred acre tract failed to disclose coal in mineable or marketable quantities when it is admitted that in that neighborhood coal veins appear and disappear unexpectedly.
2. A vendor who has not complied with the terms of his agreement by making a good title, or by conveying or offering to convey at a stipulated day, may still obtain a decree for specific performance notwithstanding his delay, provided it is not intentional, unreasonably long, or so injurious to the vendee that an enforcement would be inequitable.

WINCH, J. (orally, sitting in place of Donahue, J.) ; VOORHEES, J., and MCCARTHY, J., concur.

The petition in this case alleges that on May 10, 1900, the plaintiff was the owner in fee simple of all the coal in, on and under certain real estate, described as two hundred acres of land in Monroe township, Perry county, Ohio, and that on that day he contracted in writing to sell the same to the defendant for the sum of \$4,000, \$1 being paid at the time, and the balance of \$3,999, to be paid when the deed should be delivered; proper deed, together with abstract showing title to be in fee simple, free, from all encumbrances, to be delivered on demand on or before September 1st, 1900; that demand for deed and abstract were made upon him May 23, 1900, that he proceeded at once to the preparation of his abstract and delivered it; that defendant took possession of the premises and exercised ownership over it.

1914.]

Perry County.

The petition further alleges that plaintiff has always been and still is ready to perform said contract, and on January 19, 1901, tendered a deed to the defendant and demanded payment of balance of the purchase price, which was refused, wherefore he prays judgment that defendant perform said agreement and pay plaintiff the sum of \$3,999, with interest from January, 1901.

The answer of the defendant company contains nine defenses, which may be grouped as follows:

The first defense is a general denial with a specific denial that plaintiff was the owner in fee simple of said property, on May 10, 1900.

The second and third, fifth, seventh and ninth defenses aver that the defendant could not in law, under its charter, enter into the agreement mentioned; that the person representing the defendant in the transaction, though its agent, had no authority to bind it to the agreement; that said lands were not underlayed with a coal measure that could either be mined or marketed or contained any such coal; that upon discovering there was no mineable or marketable coal under said lands, the defendant declined to take said premises; that by reason of there being no such coal under said lands the consideration for the transaction had failed.

It will be noticed that these five defenses are based upon the claim that there was no mineable or marketable coal under said lands, and it may be observed that the burden of proving such fact is upon the defendant.

The fourth and sixth defenses allege that plaintiff was not in position on September 1st, 1900, to comply with the terms of said agreement, because his title was not good and sufficient as stipulated therein.

The eighth defense alleges in substance, that defendant was induced to enter into said agreement by the representations of plaintiff that said lands contained from six to seven feet of coal; that said representations were false, and that the contract was tainted with fraud.

While the nine defenses are separately stated and numbered and an effort has been made to group and classify them, it is

proper to state that they are so interwoven and interdependent that to support them all defendant must prove but four things:

1st. That plaintiff's title to the property was defective.

2d. That the contract was superinduced by the fraud and misrepresentations of plaintiff.

3d. That there was no mineable or marketable coal on the property.

4th. That the plaintiff himself failed to comply with the terms of the contract by delivering a deed and abstract within the time limited by the agreement.

A reply to said answer denies all its allegations, except as to the delivery or tender of deed within the time limited by the agreement, as to which proposition the plaintiff says that the time for the delivery thereof was extended by defendant.

There are few propositions of law in this case, and as to the facts it is sufficient, without commenting on the evidence, to say that we find therefrom that plaintiff's title is as alleged by him, and no fraud or misrepresentations on his part has been proven. Indeed, at the hearing counsel for defendant abandoned such claim:

Is there mineable or marketable coal under plaintiff's property.

As evidence that there is not, defendant submits the results of the drilling of two holes, one at the extreme north and one at the extreme south line of the property, perhaps half a mile apart, and drilling on property in the neighborhood, which showed too little coal to be mined or marketed.

We can not say from this testimony that this two hundred acre farm does not contain mineable and marketable coal. There is a failure of proof. At the hearing counsel for defendant admitted that in Monroe township, where the property in controversy is situated, there are faults and other irregular geological formations to such an extent that viens of coal are present and disappear most unexpectedly and unaccountably. The presence or absence of coal veins, their extent and continuity can only be determined by drilling. In view of these admissions and in the absence of any testimony of experts or others

tending to show the geological formation of the property in question, or the extent of the field indicated by witnesses in this case, we can not determine from the fact that two drillings were made on the extreme north and south limits of the farm in question, that there is no mineable or marketable coal on the property.

We have gone into an examination of this question as carefully as possible, although not only the agreement sued upon in this case provides for no drilling or tests of the property, such provision in an original draft thereof having been stricken out because plaintiff refused to agree to it, but also notwithstanding it is in evidence that the property was under option to defendant and its assigns for six months previous to the date of the agreement, with privilege to drill and test for coal, which privilege it neglected to avail itself of.

It therefore appears to us that the defendant has failed to establish any of its defenses, which are based upon there being no mineable or marketable coal upon the property. We reach this conclusion without any reference to the legal merit of said defenses had defendant proved the fact alleged.

It remains to consider those defenses which are based upon the claim that plaintiff failed to deliver a deed of the property and abstract thereof within the time limited by the agreement.

The evidence upon this subject is somewhat conflicting, but we think plaintiff has fairly established his claim that time for the delivery of abstract and deed was extended by defendant, and strict compliance on his part with this provision of the agreement was waived by defendant.

We are further of the opinion that time was not of the essence of this contract. The clause of the contract under consideration reads as follows:

"And the first parties will deliver said deed to the second party, its successors or assignees on demand, on or before the 1st day of September, 1900, upon the payment to said first parties by the second party of the purchase price herein stipulated."

"Delivery of deed by vendor. The doctrine equally applies to the purchaser and to the vendor. A vendor, who has not

complied with the terms of his agreement by making a good title, or by conveying or offering to convey, at a stipulated day, may still obtain a decree for specific performance notwithstanding his delay, provided it is not intentional, unreasonably long, or so injurious to the vendee that an enforcement would be inequitable. This results directly from the operation and effect of the contract in equity, already described, which vests the equitable estate in the purchaser, so that, being the beneficial owner of the subject-matter from the time of concluding the agreement he is not necessarily nor ordinarily injured, so as to render an enforcement unjust, by a delay in carrying out the contract and conveying to him the legal estate. If the vendor is unable to show a good title at the time prescribed in his contract, or even at the commencement of his own suit, it is sufficient therefore, if he perfects it before the final hearing, or the report on title made in the progress of the cause by the master or referee."

The preceding citation of authority is quoted only from *Pomeroy on Specific Performance*, Section 376.

See also *Brock et al v. Hidy et al*, 13 O. S., 306; *Gibbs v. Champion*, 3 Ohio, 325; *Hager v. Reed*, 11 Ohio State, 634.

Having found upon all the material issues of the case in favor of plaintiff he is entitled to the relief prayed for in his petition and decree may be drawn accordingly.

1914.]

Stark County.

**JURISDICTION OVER PROPERTY NECESSARY IN
GARNISHMENT.**

Circuit Court for Stark County.

AMERICAN SHEET & TIN PLATE COMPANY v. J. C. LEWIS.

Decided, February Term, 1911.

Attachment and Garnishment—Domicile of Garnishee Does Not Give an Ohio Court Jurisdiction Over a Debt Owed by the Garnishee in Another State—Possession Within the State Essential.

A valid and binding order of garnishment can not be made against a defendant upon a debt which he owes in another state.

Amerman & Quinn, for plaintiff in error.

J. A. Bowman, contra.

POWELL, J.; VOORHEES, J., and SHIELDS, J., concur.

This is a petition in error from the judgment of the court of common pleas, wherein judgment was rendered by that court against plaintiff in error in favor of defendant in error.

The original case was before a justice of the peace, and was brought by J. C. Lewis, the defendant in error, to recover against the plaintiff in error as garnishee in a certain action in which J. C. Lewis was plaintiff, and one John Laughley was defendant.

This order was made and entered by a justice of the peace also. The assignments of error in this case are the general assignments, that the judgment is against the law and the evidence; that the court erred in overruling the motion of plaintiff in error for new trial, and that the judgment was given in favor of defendant when it should have been given for plaintiff in error.

The question raised and presented for adjudication here, is the question whether or not a valid and binding order can be made in an attachment proceeding against a garnishee when the answer of the garnishee discloses that the property sought to be attached—in this case a debt due—was situated in another state than the state of Ohio, or beyond the territorial jurisdiction of the court making such order.

It appears that the plaintiff in error is a foreign corporation, incorporated under the laws of Pennsylvania with its principal office in the city of Pittsburgh, but with branch offices at Chester, West Virginia, and at Canton, Ohio.

J. C. Lewis became the owner of the claim against John Laughley, at Chester, West Virginia, both men residing at that place at that time. The petition and the agreed statement of facts disclose the facts as I now state them. Lewis left West Virginia and came to Canton, Ohio, and brought suit against Laughley before a justice of the peace, and by proper proceedings had an order of attachment issued against the American Sheet & Tin Plate Company, which answered that it was indebted to Laughley for wages in the sum of \$11.85, and \$4 costs of suit, and an order was made against the plaintiff in error, the American Sheet & Tin Plate Company, that it pay this amount of money to the plaintiff in that case, J. C. Lewis.

The garnishee refused to make the payment as ordered; and it is well settled in Ohio that an order against a garnishee is invalid as a judgment because he has not had his day in court; but upon that order suit may be brought, and that is the case here. Suit was brought then by said J. C. Lewis against the American Sheet & Tin Plate Company on the order as above mentioned. The evidence discloses that this debt still exists; this plaintiff in error still has money in its hands due to the said Laughley; his contract was made with the plaintiff in error in West Virginia, and the debt is due in West Virginia.

Can any of the courts of Ohio make a valid order against a garnishee in such circumstances? Now we think not if it is property that is sought to be reached, and that is so determined by 62 O. S., at page 543. The court there says:

“Our statutes regulating attachment and garnishment (Section 5522. R. S.), do not give to courts issuing such process jurisdiction over property of the defendant situated wholly beyond the borders of the state, nor power to require a garnishee having property of the defendant in his possession without the state to surrender the same into the custody of the court, and an order on the garnishee requiring such act is without legal effect.”

The court in its opinion on page 560, quoted from the 8th American & English Encyclopedia of Law, as follows:

“To charge a garnishee for property of defendant, it is absolutely essential that at the time of service of process he should have it in his possession and within the state.”

And the court further says, quoting from the same authority at page 1255, “The domicile of the garnishee does not give the courts of the state jurisdiction over the debt he owes to a party in another state, and is not sufficient to sustain an action *in rem*” (and that is what an action in attachment always is). “This is not determined by his domicile, but by the situs of the property which he holds.”

We find also in 8 N. P. a case cited, by the Superior Court of Cincinnati, the following, to be found on page 350:

“A person can not be subjected to garnishment by the statutes of the state in which he may be, differing from that of his domicile, unless he has property of the debtor in his possession or owes a debt payable in such state.”

Second. The domicile of the creditor is the situs of the debt.

Third. A debt due and payable outside of the state that is due from one non-resident corporation to another non-resident corporation, is not subject to process of attachment and garnishment issued by the courts of such state of which they are not residents.

Now we think that applies to this case. Plaintiff in error is not a resident of the state of Ohio; the debt it owed is to a resident of West Virginia, although that is not exactly this case. because he is an individual and not a non-resident corporation, as in the case cited.

We think this plaintiff in error is not subject to garnishment in the court of Ohio for a debt it owes in West Virginia, and while the court below, we think, obtained jurisdiction over defendant Laughley by his entering appearance here, yet it did not obtain jurisdiction over the subject-matter, so as to make a valid and binding order upon the garnishee.

For this reason, the judgment of the court of common pleas is reversed and the cause remanded for further action in the court below. Exceptions noted.

**RIGHT OF SET-OFF NOT DEFEATED BY ASSIGNMENT
OF JUDGMENT.**

Circuit Court of Cuyahoga County.

CARL J. HAKER V. JOHN SERHANT AND BERKLEY PEARCE.

Decided, January, 1904.

Exemptions—Set-off—Exemptions a Personal Privilege—Right of Set-Off Not Defeated by Assignment of Judgment.

1. The assignment of a judgment does not defeat the right of set-off.
2. The right to exemptions is personal and can not be transferred to the assignee of a judgment against which the right to a set-off existed.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Plaintiff in error brought this action in the court of common pleas against the defendants in error alleging that on February 1, 1900, defendant, John Serhant, recovered a judgment for \$19.08 against the plaintiff; that on February 6, 1900, plaintiff recovered a judgment for \$25 against defendant, John Serhant; that on February 8, 1900, defendant, John Serhant, assigned his judgment to defendant, Berkley Pearce; that John Serhant is insolvent. The prayer of the petition is that so much of the last judgment as may be necessary be set off against the first judgment and for equitable relief.

The defendants answering, admit all the allegations of the petition but allege that at the time John Serhant assigned his judgment to Berkley Pearce the former was the head of a family and entitled, under the laws of Ohio, to hold said judgment as part of his exemptions.

To this answer a demurrer was interposed and the demurrer being overruled, judgment was entered against the plaintiff

1914.]

Cuyahoga County.

and he has filed his petition in error in this court to reverse the said judgment.

Authority for bringing this action, if not found in the statutes, is contained in the case of *Barbour v. The Bank*, 50 O. S., 91. Plaintiff is not deprived of his right to set off his judgment against John Serhant by the assignment to Berkley Pearce. Section 5073, Revised Statutes.

Had the assignment not been made, there is authority for the claim of counsel for defendants that a set-off will not be ordered against a judgment which a debtor is entitled to hold as property exempt from execution (*Diehl v. Friester*, 37 O. S., 473). This proposition, however, was not the precise point before the court in the latter case. Judge Okey in referring to such holdings cites the following cases: *Duff v. Wells*, 7 Heiskell (54 Tenn.), 17; *Wilson v. McElroy*, 32 Pa. St., 82; *Beckman v. Manlove*, 18 Cal., 388; and *Curlee v. Thomas*, 74 N. C., 51.

The first three cases cited by Judge Okey involved attempts on the part of judgment creditors to circumvent the exemption laws by seizing property of their debtors, and then suffering judgments therefor to be rendered against themselves, which they asked to be set off against their own claims. The last case, *Curlee v. Thomas*, 74 N. C., 51, involved a similar fraud. There are no such circumstances in this case.

The North Carolina case, without being overruled, is followed by the case of *Lane v. Richardson*, 104 N. C., 642, where it was held that as far as personal property was concerned, the right of exemption is personal to the debtor, and it loses its quality of exemption as soon as it is transferred. This case sets forth the rule to be followed in a case like the one at bar, and is the rule in Ohio.

“While the exemptions in favor of debtors are, by statute, tendered and extended to all alike who fall within the provision of it, yet no rule is better settled than this: that these statutory rights in cases where the exemption depends upon selection or demand, as in cases like this, may be waived in terms, or impliedly, by failing to assert the right or make the demand at the proper time, and the right can not be negotiated or transferred.

“The general right is statutory, the particular right is strictly personal and in practice becomes simply a personal privilege, to be asserted or not at the will of the person in whose favor the right exists.” *Conley v. Chilcote*, 25 O. S., 320.

John Serhant's right of exemption depended upon selection or demand which he failed to make before assigning the judgment; it was thereby waived. He now has no interest in the judgment and therefore can claim no rights of exemption or otherwise in it. He could not transfer his right of exemption to Pearce, and Pearce can therefore assert no right of exemption. Neither does the assignment of the judgment defeat the right to set-off. Section 5073, Revised Statutes.

The demurrer should have been sustained and for error in overruling it the judgment is reversed.

APPEAL IN ALIMONY CASE WITHOUT BOND.

Circuit Court of Cuyahoga County.

MINEDA E. COLBY v. H. H. COLBY ET AL.

Decided, January, 1904.

Appeals—Alimony—Wife May Appeal Cause for Alimony Without Giving Bond.

An action wherein a wife has sought alimony and a decree subjecting property of the husband in the hands of third parties to the payment of the alimony, may be appealed without the giving of an appeal bond.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Plaintiff brought an action in the common pleas court against her husband and his daughter praying for an allowance of alimony and that property in the hands of the daughter be charged with the payment of said alimony as the property of her husband.

Upon the hearing the court awarded alimony to be paid weekly by the husband, but on the issues joined with the daughter,

found in favor of the daughter. Plaintiff duly filed notice of appeal but no appeal bond, and the matter is now before this court on a motion by the daughter to dismiss the appeal as to her because no appeal bond has been given.

Whatever doubt formerly may have existed as to the practice of joining in a suit for alimony a cause of action against a third person, charging the latter with the possession of property out of which alimony is sought (*Laughery v. Laughery*, 15 O., 404), such procedure is now authorized by Section 5701, Revised Statutes, found in the chapter on divorce and alimony.

It is not doubted that all the issues in this case were appealable, as none of the parties were entitled to a jury on any question involved (Section 5226, Revised Statutes). The general statute on perfecting appeals (Section 5227) provides that the party desiring to appeal shall file an undertaking within thirty days after the entering of the judgment appealed from. The requirement of a bond is waived by several sections of the statutes. A party in any trust capacity or a county treasurer under certain circumstances, is not required to give bond (Section 5226). A party in a fiduciary capacity, in which he has given bond within the state, for the faithful discharge of his duties, who appeals in the interest of his trust, need not give bond. Section 6408.

So we find in the chapter on divorce and alimony that by Section 5706 appeals from judgments or orders under said judgment are limited to certain cases, among them a final judgment or order refusing alimony. There was such final order in this case, granting alimony and refusing to charge it upon property in possession of the daughter. Counsel for the daughter say that the order as to her was not under this chapter, but under the general equitable powers of the court or under sections of the statutes found in other chapters, citing Sections 4198, 6343 and 7080. We are inclined to believe counsel is wrong in this claim, but it is unnecessary to rule upon it. The last clause of Section 5706 stands by itself and reads as follows: "and when an appeal is taken by the wife, she shall not be required to give bond." The wife can not appeal part of her cause without

appealing all the issues in it (*Branch v. Dick*, 14 O. S., 551, 557; *Wright v. Western Union Telegraph Company*, 4 C. C., 375). Nor was there any effort made in this case to appeal this case as to part of the issues; the notice of appeals reads: "Now comes plaintiff and gives notice of her intention to appeal this case to the circuit court," etc. No question is raised as to her right to appeal the alimony part of her case, without giving bond. By appealing it all she brought up the whole case. Should the motion of the daughter be granted, only part of the case would be here on appeal, necessitating its dismissal under the authorities cited. We do not think the right of the wife to appeal without bond should be thus nullified. It is one of the beneficent provisions of the law in harmony with other provisions which favor her on account of her necessities.

The motion is overruled.

VERDICT CONTRARY TO ALL THE EVIDENCE.

Circuit Court of Cuyahoga County.

W. W. MCGILL v. JOHN A. WEBER.

Decided, January 16, 1905.

Trials—Compromise Verdict Set Aside.

Where the jury returns a verdict which is contrary to the evidence introduced by both plaintiff and defendant it will be set aside.

Walter C. Ong, for plaintiff in error.

Higley & Maurer, contra.

WINCH, J.; HALE, J., and MARVIN, J., concur.

The plaintiff in error brought an action in the common pleas court against defendant in error to recover under the statute money claimed to have been lost at gambling; he recovered a verdict upon which judgment was entered for \$50, which he asks us to set aside as against the weight of the evidence. We have

1914.]

Cuyahoga County.

read all the evidence in the case, and if we are to believe plaintiff's witnesses, he should have recovered several hundred dollars; if we are to believe defendant's witnesses, there should have been a verdict for defendant, as he claims plaintiff was indebted to him in the sum of \$50; there is no middle ground. Such being the case, it is apparent that the jury absolutely disregarded the evidence in arriving at its conclusion. Whether there was a "guessing match" in the jury-room, as claimed by counsel for plaintiff in error, we do not know: but it is apparent that the verdict is not sustained by the evidence and for that reason it is set aside.

Judgment reversed.

ATTACHMENT ON A CLAIM FOR NECESSARIES.

Circuit Court of Cuyahoga County.

MARIE CORBETT v. A. GOLDWENDER.

Decided, January 16, 1905.

Attachment—Property Other than Personal Earnings May be Attached on Claim for Necessaries.

Property other than the personal earnings of debtor may be attached where the claim upon which judgment is asked is for necessities.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Action was brought by defendant in error against plaintiff in error, before a justice of the peace to recover "the sum of \$58 for necessities furnished, to-wit, necessary clothing and wearing apparel," and upon the plaintiff's affidavit the justice issued an order of attachment which was levied upon property of the defendant, including certain wearing apparel, but no part of the defendant's personal earnings were taken or garnisheed in said proceedings. Motion by the defendant to dissolve the attachment being overruled, defendant appealed said motion to the common pleas court, where it was heard and again over-

ruled; the court, however, released the attached wearing apparel, holding that it was exempt from attachment.

By proper proceedings the case is properly before this court on error, and the sole question submitted for our consideration is whether, in an action for necessities, where an attachment has been issued on the sole ground that the claim on which judgment is sought is for necessities, property other than the personal earnings of the debtor can be attached? We answer this question in the affirmative. The trial court having come to the same conclusion, the judgment is affirmed.

**VALIDITY OF STATUTE PROVIDING FOR ATTACHMENT OF
DEBTOR'S PERSONAL EARNINGS.**

Circuit Court of Cuyahoga County.

A. C. WICOX v. K. B. COMPANY.

Decided, January 16, 1905.

Attachment—Constitutional Law—Law Permitting Attachment of Personal Earnings Constitutional.

The law permitting the attachment of 10 per cent. of a debtor's personal earnings, where a claim is for necessities, does not create a favored class and is constitutional.

A. V. Taylor, for plaintiff in error.

W. P. Dunlap, contra.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Defendant in error having brought an action before a justice of the peace against plaintiff in error, to recover for necessities, an order of attachment was issued and thereupon the defendant in said action moved to discharge the attachment. This motion being overruled an appeal was taken to the common pleas court where the motion was again overruled, to which ruling plaintiff in error excepted and brought the matter here on error.

But two reasons were urged at the hearing in this court, why the judgment of the common pleas court should be reversed.

1914.]

Cuyahoga County.

First. That the order of attachment herein is void for want of due execution and return. That the return of the constable on the order of attachment is not according to law, is apparent, but the garnishee had actual notice and answered. We think this cures the informality in service.

Second. That the statutes under which the attachment proceeding was brought are unconstitutional, in making the mere fact that the claim on which judgment is sought is for necessities a ground of attachment, and in such cases exempting only ninety per cent. of the debtor's personal earnings, while in other cases all his earnings for the three months are exempt, if required for the support of the debtor's family.

It is said that these provisions with regard to actions for necessities create a favored class, who alone may take advantage of the statute, namely, those who furnish necessities.

We do not think so. The Legislature has seen fit to define certain rights and remedies in a certain *class of cases*; it has not created *classes of persons upon whom the laws operate without uniformity.*

Believing such legislation is not inhibited by the Constitution, the judgment is affirmed.

**PROSECUTION FOR KEEPING OPEN ON SUNDAY A PLACE
WHERE INTOXICATING LIQUORS ARE
COMMONLY SOLD.**

Circuit Court of Cuyahoga County.

VILLAGE OF EUCLID V. THEODORE BRAMLEY.

Decided, January 26, 1905.

*Municipal Ordinances—Intoxicating Liquors—Municipal Ordinances Not
Judicially Noticed—Municipal Ordinance Must Conform to Au-
thority Granted by State Laws.*

1. Courts other than municipal tribunals will not take judicial notice of municipal ordinances.

2. Municipal ordinances can only be passed in conformity with the power granted by the State Legislature, and when the Legislature has conferred authority to pass ordinances regulating the sale of intoxicating liquors as a "beverage" and to "regulate ale, beer and porter houses and shops," courts can not presume the existence of a valid ordinance enacted under those statutes, where the affidavit upon which an arrest and prosecution is based only charges that the accused allowed to remain open on Sunday his place of business where upon other days intoxicating liquors were commonly sold, without charging that they were sold as a "beverage" or that the place was an "ale, beer, or porter house or shop."

WINCH, J.; HALE, J., and MARVIN, J., concur.

Defendant in error was arrested under an affidavit which charged:

"On or about the 12th day of June, A. D. 1904, at the village of Euclid in said county and state, one Theodore Bramley did on the first day of the week, commonly called Sunday, allow to remain open his place where upon other days intoxicating liquors are commonly sold, contrary to the form of the ordinance in such cases made and provided."

The accused was taken before the mayor of the village of Euclid, pleaded guilty, was sentenced to pay a fine of \$100 and costs and then moved in arrest of judgment, claiming:

1st. The facts set out in the affidavit do not constitute an offense against the ordinance of the village of Euclid, nor against the statutes of the state of Ohio.

2d. The ordinance upon which said prosecution is predicated is unconstitutional and void.

This motion was overruled, defendant excepted and applied to the common pleas court for leave to file a petition in error in said court, which was granted.

Thereupon said defendant filed his petition in error in the common pleas court, accompanied by a transcript of the docket entries made by the mayor. There was no bill of exceptions showing the ordinance which was necessarily before the mayor for his consideration upon the motion in arrest of judgment.

The common pleas court heard the case on error and reversed it, holding the affidavit insufficient for lack of the negative

averments that the *place* was not a drug store or the accused a druggist, as provided in Section 4364-20c, Revised Statutes.

Thereupon the village of Euclid brought the case here on error, where the first question raised is the jurisdiction of this court to review a judgment of the common pleas court reversing a conviction for violation of a municipal ordinance on proceedings before a magistrate.

We think there can be no doubt of the jurisdiction of this court in such cases. *Village of Shelby v. Boenan*, 40 O. S., 253.

Being of opinion that neither this court nor the common pleas court can take judicial notice of municipal ordinances, and there being before the common pleas court no transcript of the ordinance under which the accused was convicted, the next question arising is: Had the common pleas court or had this court a right to presume the existence of a valid ordinance warranting an affidavit and charge that defendant "on the first day of the week, commonly called Sunday, allowed to remain open his place where upon other days intoxicating liquors are commonly sold?"

If the Legislature has delegated to municipal corporations authority to pass an ordinance regulating places "where intoxicating liquors are commonly sold," then we must presume that there was a valid ordinance back of this affidavit. But what powers in this respect have been delegated to municipal corporations? Section 1536-100, Revised Statutes, among other things provides:

"All municipal corporations shall have the following general powers and council may provide by ordinance or resolution for the exercise and enforcement of the same. * * *

"5. To regulate, ale, beer, porter houses and shops, and the sale of intoxicating liquors as a beverage, but nothing in this act shall be construed to amend, repeal or in any way affect the provisions of an act entitled, 'An act to amend Section 4364-20 of the Revised Statutes of Ohio, and to supplement said section by enacting supplementary Sections 4364-20a, etc., passed April 3, 1902 (95 O. L., 87)' "

Had the affidavit charged defendant with keeping open on Sunday a place where ale, beer, or porter were commonly sold,

or where intoxicating liquors were sold as a beverage, we might presume there was back of it a valid ordinance making such act punishable. There is no allegation in the affidavit from which can be gathered the conclusion that defendant's place was an ale, beer, or porter house or shop, or that in it he sold intoxicating liquors as a beverage.

So in Section 4364-20, Revised Statutes, it is provided:

"And any municipal corporation shall have full power to regulate the selling, furnishing or giving away of intoxicating liquors as a beverage, and places where intoxicating liquors are sold, furnished or given away as a 'beverage,' except as provided for in Section 4364-20 of this act."

Section 4364-20c refers to the *selling* of intoxicating liquors at retail by a regular druggist.

Any ordinance passed under authority of Section 4364-20, must designate the place as one where intoxicating liquors are sold *as a beverage*. It follows that an affidavit which does not charge the place as one in which intoxicating liquors were sold *as a beverage*, can not be presumed to have back of it an ordinance passed under authority of the statute last cited.

Being of opinion that the village of Euclid had no power to make it an offense to keep open on Sunday a place in which intoxicating liquors are commonly sold on other days, it follows that the common pleas court was right in reversing the judgment of the mayor's court.

To entertain any presumption in favor of the existence of a valid ordinance defining an offense and providing penalty therefor, has been criticized as, in a sense, a departure from the rule frequently announced by this court that it will not take judicial notice of municipal ordinances. But it is not, in fact, any exception to said rule, where error is alleged by one convicted before the mayor or magistrate. Being plaintiff in error, he must file a bill of exceptions setting forth the ordinance, so that it may come before the reviewing court. His own neglect to bring the ordinance into the record does not entitle him to a reversal; rather the judgment should be affirmed because no error is shown.

1914.]

Cuyahoga County.

But when in such case the plaintiff in error from the mayor's court calls attention to the state law, shows that the state law gives no authority to the municipality to pass any ordinance making it an offense to do what is charged in the affidavit, we have considered the case with reference to the statutes and decided accordingly, as we did in the case of *Lewis v. Collinwood*. Lewis was charged with having a gambling device in his possession, and we held that we would not presume an ordinance making a mere possession of a gambling device an offense, the statute only authorizing an ordinance to prevent gambling.

Ordinances inconsistent with the laws of the state are void. *City of Canton v. Nist*, 9 O. S., 439.

An ordinance making it an offense to do what is charged in this affidavit would be inconsistent with the laws of the state. As to the reasons given by the common pleas court for reversing the conviction, we express no opinion. The decision of that case is found in 51 Bull., 155.

Judgment affirmed.

**CONVERSION OF STREET INTO A VIADUCT CAN NOT BE
ENJOINED BY AN ABUTTING OWNER.**

Court of Appeals for Hamilton County.

THE CINCINNATI UNION STOCK YARDS COMPANY v. THE CITY
OF CINCINNATI.*

Decided, July 21, 1913.

Tax-Payer—Barred from Bringing an Action on Behalf of the Municipality, When—Ordinance May be Regarded as Containing but One Subject Although Treating of Many Matters of Detail—Abutting Owner Relegated to an Action for Damages and an Injunction Not Allowed to Prevent Public Improvement.

1. The right of a tax-payer to bring an action on behalf of the city is barred, where the question which he desires to raise is one which might properly have been raised and litigated in a previous action brought by the city solicitor and carried to a final judgment.
2. An ordinance relating to a separation of grades at a crossing of a street over railway tracks will be deemed to contain but one subject, notwithstanding many matters of detail may be involved therein.
3. The fact that an abutting property owner may be greatly inconvenienced by the conversion of the street in front of his property into a viaduct and may lose a portion of his land through appropriation for that purpose, and it is evident the damage he is about to sustain to his remaining property will be very great, yet the fact that he has a complete remedy by way of compensation deprives him of the right to an injunction against the carrying forward of the improvement, where it appears that it will be of great benefit to the community at large.

Paxton, Warrington & Seasongood, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for B. & O. S. W. R. R.

Stanley Merrell, Assistant Solicitor, for city.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

This case was heard on appeal from the court of common pleas, and is a suit brought by plaintiff in the dual capacity as a tax-payer of said city of Cincinnati on behalf of said city, and as an

*Affirming *Cincinnati Union Stock Yards Co. v. City of Cincinnati*, 14 N.P.(N.S.), 529.

1914.]

Hamilton County.

individual. The suit is to enjoin the city from proceeding under Ordinance 141 providing for the separation of grades at the intersection of Hopple street and the tracks of the Baltimore & Ohio Southwestern Railroad.

The court is of the opinion that the right of the plaintiff to proceed on behalf of the city as a tax-payer is barred by the suit brought by the city of Cincinnati by its city solicitor in case No. 150293 and the judgment therein. See *Thoms v. Greenwood*, 6 O. Dec. Reprint, 320:

“Where the solicitor of a city prosecutes under Section 159 of the municipal code, an action to final judgment, no tax-payer of the corporation has the right to maintain any action for the same cause, but all become bound by the judgment finally rendered in such case. All questions and matters involved in the determination of such suit, or that could or might have been raised thereby, are concluded and finally settled by the judgment rendered in said case as to all persons whomsoever the same being *res adjudicata*.”

The questions raised in the suit referred to above were the validity of the same ordinance that is here attacked and the rights of the city to proceed thereunder. And while the point made and particularly relied upon by the plaintiff in that case was that money had not been certified to be in the treasury under the provisions of Section 3806, General Code, still all other questions that are raised in this case by plaintiff in its capacity as a tax-payer could have been raised and litigated in that case and should have been there considered. *Cov. & Cin. Bridge Co. v. Sargent*, 27 O. S., 233; *Hixon v. Ogg*, 53 O. S., 361 *Strangward v. Am. Brass Bedstead Co.*, 82 O. S., 121.

In the last case the second proposition of the syllabus is as follows:

“When a matter has been finally determined in an action between the same parties by a competent tribunal, the judgment is conclusive, not only as to what was determined, but also as to every other question which might properly have been litigated in the case.”

It therefore becomes a question as to the rights of the plaintiff suing as the owner of property abutting upon said improvement

in its individual right, and not on behalf of the city of Cincinnati, to enjoin the doing of the work under said ordinance. Plaintiff relies upon the case of *The P., C., C. & St. L. R. R. Co. v. Greenville*, 69 O. S., 487, as showing a right in every instance in a property owner to inquire into the regularity and validity of the proceedings for appropriation in an independent suit before the hearing of appropriation proceedings can be had. We do not think that the decision in this case would apply to an individual owner of property in all cases. The question there decided was whether a railroad company, which was exercising necessary public functions and had power of eminent domain for such purpose, could have its tracks interfered with by the extension of streets across same, where it could show that necessity did not require it.

While the business of the plaintiff in this case in carrying on its stockyard is an important business to the community, and the interference may be very hurtful to the business and may require heavy damages paid by the city under such appropriation proceedings, still it possesses no power of eminent domain and does not perform such public functions as would permit it to prevent the extension of a street or public way across or along its property after full compensation for same had been determined and paid. We seriously question, therefore, whether as such property owner, in advance of the hearing of the appropriation proceedings, it would have a right to enjoin. As an owner of abutting property, however, it has a peculiar interest in the street which is to be changed by these proceedings and a part of which is to be vacated. We have considered fully, therefore, the reasons presented by it why an injunction should issue.

Ordinance 141 involves the consideration of many questions, but all of the matters embraced within it relate to the subject of the separation of grades at the intersection of Hopple street and the railroad, and the ordinance therefore does not violate Section 4226, General Code, which provides that:

"No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title."

The title is sufficiently broad to include all of the provisions of the ordinance, and the requirement of the statute is not to be

1914.]

Hamilton County.

determined by its form but rather in the light of the mischief the statute was intended to prevent. *Heffner v. City of Toledo*, 75 O. S., 413.

The objection made that the city intends to build the viaduct sixty feet wide, while the present street grade crossing is only forty feet in width, and that the railroad company is only required to pay fifty per cent. of what the cost would be if the city had constructed a forty-foot viaduct instead of the one provided for, is a question with which the plaintiff can not be concerned except in its capacity as a tax-payer, and that we have already shown can not be pressed by it in this case. But the court is of the opinion that the provision made by the city is all that can be insisted upon by it under the provisions of the law as it existed at the inception of this improvement. To enforce the sharing of the cost by the railroad company of the completed viaduct sixty feet in width would require first that the present grade crossing be widened to a sixty-foot crossing, before it could be abolished and replaced by a sixty-foot viaduct. This would require the outlay and expense of condemnation to first provide for the wider grade crossing, and then would require that all of the proceedings be started again, *de novo*, to provide for the sixty-foot viaduct. Whether or not the time and the expense involved would be repaid by the increased contribution thus to be levied upon the railroad company is a practical question of administration that is addressed to the legislative and executive officers of the city rather than to the courts. They have, as we think, properly acted upon this question within their powers, and if they have the right by the process we have indicated to build a sixty-foot viaduct by first widening the crossing, it would clearly seem that they had the right to build the wider viaduct as proposed in abandoning the present crossing.

The testimony showed that the plaintiff will be greatly inconvenienced in its business by the new improvement, but such inconvenience and damage can all be compensated for in money and will all be taken into consideration by the court in the appropriation proceedings, and while the damage is claimed in this proceeding to be irreparable, after all it becomes merely a question of compensation to be determined in the appropriation pro-

ceedings and does not authorize plaintiff to interfere with an improvement which is of great importance to the municipality and its citizens and which, planned as it is to protect and save human life, should not be delayed when plaintiff has a complete and adequate remedy for all damages to be suffered by it, in appropriation proceedings.

The relief prayed for by plaintiff will therefore be denied, and the petition dismissed at its costs.

ERROR IN ADMITTING IN EVIDENCE A PRINTED RECORD.

Court of Appeals for Butler County.

WALTER S. HARLAN, ASSIGNEE, ETC., v. LUCY M. HENRY
GUNDERSON ET AL.

Decided, May, 1914.

Evidence—Unauthenticated Copy of Court Proceedings—Not Competent as Proof of a Question of Fact.

It is error to admit in evidence a printed record of a cause determined in another court, unauthenticated by the certificate of the judge and clerk of said court, where the matter sought to be established thereby is one of fact; but where plaintiff had failed to prove the facts necessary to make his case and the proof so introduced by defendant became immaterial, its admission was not prejudicial or ground for reversal.

John F. Neilan and Andrews & Andrews, for plaintiff in error.

Stanley Shaffer and Baker & Baker, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

The question presented to the court by proceedings in error at this hearing is whether or not the action of the court below in entering judgment for plaintiff upon the cross-petition of Walter S. Harlan, assignee of the McSherry Manufacturing Company, should be sustained.

1914.]

Butler County.

The chief error relied upon by plaintiff in error is the action of the court in admitting the printed record of the case of *Seiler v. Fuller & Johnson Mfg. Co.*, found in Volume 181 Federal Reporter, at pages 85 to 90 inclusive. This report was from the bound volume of the Federal Reports, and was not authenticated by the certificate of the judge and clerk of the court, and was introduced for the purpose of establishing certain facts that were set out in said decision, which plaintiff below contended showed that the litigation there before the court did not embrace the Gunderson patents.

In the opinion of the court the admission of this record by the court below, in the form presented, was error. Under Section 11499, General Code, this evidence so offered would have been properly admissible if the question of law there decided was the matter to be proved, but it was not proper evidence to show matters of fact involved in the cause there decided.

The question raised by the cross-petition was whether under the Gunderson contract the cross-petitioner was entitled to recover for expenses incurred in litigating with reference to the Gunderson patents. The burden was upon the cross-petitioner to sustain his account for expenses as set out in his cross-petition by proper proof. A careful examination of the record discloses that by the testimony of Mr. Fetzer, who had been the general manager of the company, it was shown that certain moneys had been expended in matters connected with litigation of patents for the model planter and for the automatic planter, but we find no proof that these expenses were incurred with reference to the features of either of the Gunderson patents; and, indeed, Mr. Fetzer states that the planters then being manufactured were not based upon said patents.

It will appear that the cross-petitioner failed in his proof to show that the expenses sought to be recovered were thus provided for by its contract with Gunderson, and therefore the admission of the record in the Federal Reporter offered by plaintiff can not be deemed as prejudicial.

We fail to find any prejudicial error within the terms of Section 11364, General Code, and judgment below is therefore affirmed.

SECTION FOREMAN RUN DOWN BY A SWITCH ENGINE.

Court of Appeals for Lucas County.

SHERMAN, ADMINISTRATRIX, v. THE TOLEDO & OHIO CENTRAL
RAILWAY CO.

Decided, February 8, 1913.

Negligence—Wrongful Death—Whether the Injured Employee Was at the Time of the Accident—Engaged in the Line of His Employment is a Question for the Jury—Rule of Company Requiring Caution on the Part of Employees Competent, When—Comparative Negligence—Section 9018.

1. Where a section foreman, engaged in repairing tracks in a railroad yard, has gone to an adjoining yard of the same company and in returning in the middle of the afternoon to the point where his men were working walked on the track and appeared to be looking along the track and was struck and killed by a switch engine moving backwards following him, it is for the jury to determine whether he was in line of his duty as an employee at the time he was struck by the engine, and whether there was negligence and contributory negligence, and it is error to direct a verdict for the defendant.
2. In such case, if the jury find that each party was guilty of negligence directly contributing to the injury, it is their duty, pursuant to Section 9018, General Code, to determine, under appropriate instructions from the court, whether the contributory negligence of the decedent was slight and the negligence of the company greater in comparison, and, if they so find, to diminish the damages in proportion to the negligence attributable to the decedent in the event of a verdict being returned for the plaintiff.
3. A rule of the company requiring every employee to exercise the utmost caution to avoid injury to himself or to his fellows is competent evidence in the trial of such an action, and it is prejudicial error to exclude the same.

O. S. Brumback, for plaintiff.

Doyle & Lewis, contra.

RICHARDS, J.; WILDMAN J., concurs; KINKADE, J., dissents.

The plaintiff in error, Mary Sherman, administratrix, brought an action in the court of common pleas to recover damages sus-

1914.]

Lucas County.

tained by reason of the death of her husband, Joseph Sherman, which occurred on the 26th day of November, 1910. Mr. Sherman was a section foreman in charge of a gang of men engaged in repairing tracks in what is known as the eastern division yard of the defendant company just outside of the city limits of Toledo. Immediately prior to the time of the injury which caused his death, he had visited an adjoining railway yard known as the western division yard of the same company, for what purpose does not appear, and he received the injury that resulted in his death while he was returning. The accident occurred between three and four o'clock in the afternoon. In returning he traveled along a highway, which crossed the railroad tracks, to a point near the scene of the accident, and there turned from the highway and walked south on the railroad track toward his men. At the time of his leaving the highway there was standing just north of the highway a switch engine on which was the switching crew. This engine was located a very short distance north of the highway, and was upon the track down which Mr. Sherman walked toward his men. Within a short distance south of the highway Mr. Sherman was overtaken by this switch engine, backing southward, and injured in a manner that caused his death very shortly thereafter.

The negligence alleged against the company was the failure to give any notice or warning by bell or whistle of the approach of the switch engine following Mr. Sherman. It was also charged that the switching crew, and particularly the engineer and fireman, failed to keep any lookout in the direction in which they were moving, and it is said that had they done so they must of necessity have discovered Mr. Sherman upon the track. The petition alleged that, contrary to a rule of the company, the entire switching crew, embracing not only the engineer and fireman but the conductor and both brakemen or helpers as well, were in the cab of the engine while it stood north of the highway crossing and as it followed down the track to the place of the accident.

The case was tried upon the second amended petition, and "amendment to the amended petition," the answer of the de-

fendant and the reply. It is evident that the amendment to the amended petition was intended as an amendment to the second petition. At least it was filed after the second amended petition, and we think it is not accurately entitled. The facts relative to the accident which we have stated are as claimed by the plaintiff. The defendant admitted the accident and the death resulting therefrom, denied all acts of negligence and averred contributory negligence of the decedent. At the close of the plaintiff's evidence the defendant moved the court for a directed verdict, which was overruled. At the close of all the evidence the motion was renewed, was granted and a verdict for the defendant returned accordingly, upon which judgment was entered.

During the trial the plaintiff below offered to introduce rule 719 of the defendant company in evidence. The rule reads as follows:

"Every employee is required to exercise the utmost caution to avoid injury to himself or to his fellows; especially in the switching of cars and in all movements of engines and trains."

The court excluded this rule from the consideration of the jury and this is assigned as error. We think the action of the trial court was not in accordance with the holding of the Supreme Court in *Cincinnati Street Ry. Co. v. Altemeier, Admr.*, 60 Ohio St., 10. It is true the rule imposed upon the employees a higher degree of care than rested on the company under the law, but, nevertheless, the existence of the rule would aid the jury in ascertaining whether Sherman was guilty of contributory negligence, and would therefore be competent evidence. It is doubtless true that much of what is said by Burket, J., in announcing the opinion in the above case, relative to such a rule or was offered in evidence in this case, is *obiter*, but the view adopted is sustained by ample authority as stated by him. If the rule is introduced in evidence the jury should be cautioned as to the difference in the degree of care mentioned in the rule and that applicable to the company.

The defendant in error contends that there was no evidence in the case tending to show any violation of duty on the part of the

1914.]

Lucas County.

railroad company toward Mr. Sherman. It is urged that he was not at the moment of his injury engaged in any duty which so engrossed his attention as made it impracticable for him to look out for his safety and imposed upon the company the duty of giving him notice of approaching danger. In fact, it is said that he was not engaged in any duty at all, but was returning to the place where his men were at work, and with nothing to take his attention from his surroundings. The only evidence tending to show that at the time of the injury he was engaged in this discharge of his duty as foreman consisted in statements of witnesses that he seemed to be looking along the track. The fact is not in dispute that he was in the employ of the company at the time, that his position was that of foreman, and that he was at the moment of the injury returning to the place where his men were still at work on the tracks of the yard, but whether he was then in the line of his duty as an employee was a proper question for the jury.

The conclusion of a majority of the court is that there was some evidence offered tending to show the negligence of the company in not giving, by bell or whistle, some notice to Mr. Sherman of the approach of the switch engine. We are also of the opinion that there was evidence in the case tending to show the negligence of Mr. Sherman in walking upon the railroad track from the highway toward the point where his men were at work, instead of walking between the tracks and in failing to take account of the dangers incident to the situation. Whether the surrounding conditions were such as to impose upon the company the duty of giving notice by bell or whistle to Mr. Sherman was a question of fact for the jury.

We refrain from expressing any opinion as to the weight of evidence touching the issues in this case. A majority of the court are of the opinion that there was evidence sufficient to have taken the case to the jury, and further than this we need not go.

Under Section 9018, General Code, it would be the duty of the jury to determine from the evidence whether negligence existed on the part of the company, and also whether contributory negli-

Hammel v. Gould.

[Vol. 20 (N.S.)]

gence existed on the part of Mr. Sherman, and the degree of negligence of each in comparison.

For the reasons stated, the judgment below must be reversed and the cause remanded for new trial and further proceedings according to law.

Judgment reversed.

KINKADE, J.

I think the judgment of the court of common pleas should be affirmed.

INCONSISTENT TESTAMENTARY PROVISIONS RECONCILED.

Court of Appeals for Hamilton County.

ELIZABETH C. HAMMEL v. WILLIAM ROBERT GOULD.

Decided, June 3, 1914.

Wills—Determination as to Which is the Dispositive Clause—Other Provisions Inconsistent Therewith Reconciled.

Item I of the will under consideration is the dispositive clause so far as the widow of the testator is concerned, and the inconsistent provision found in Item II should be reconciled with this construction by reading "and" for "or," which postpones the right of partition.

S. B. Hammel, for plaintiff.

F. H. Reppert and *J. J. Acomb*, contra.

JONES, E. H., J.; SWING, J., concurs; JONES, O. B., J., dissents in a separate opinion.

Plaintiff filed her petition for partition of the property described therein. Her right to partition depends upon a construction of the will of Richard Gould, deceased. Richard Gould died in the year 1879 leaving a widow and six children, several of whom were minors. At the time of his death he was seized in fee of the property of which partition is sought. The widow

1914.]

Hamilton County.

still lives and has never remarried. Five of the children are living and are of full age.

Items I and II of the will to be construed are as follows:

"I. I hereby give, and bequeth to my beloved wife, Martha Gould, all the property, both real and personal, of which I die possessed, she to pay all just debts that I owe, and have and hold the property hereby bequeathed, so long as she continue my widow, and until my youngest child shall be of age.

"II. When the youngest child arrives at full age, or in case my wife Martha should again marry, it is my will that my real estate and whatsoever personal property may be remaining be divided between my wife and children, according to the law for the distribution of estates where no wills have been made."

These two items of the will are conflicting. Item I gives to the widow Martha Gould the right to "have and hold the property hereby bequeathed, so long as she continues my widow, and until the youngest child shall be of age." This item standing alone is clear and gives to the widow a life estate in the property provided she does not remarry.

The verbs "have" and "hold" as used in this clause are modified by the two adverbial clauses "so long as she continues my widow" and "until my youngest child shall be of age." These clauses are joined in the will by the conjunction "and." There is nothing in the language to indicate that they are intended as conditions upon which she can hold the property as claimed by plaintiffs. They are not conditions but adverbs, and state how long she shall hold the property. The testator first says she shall hold it so long as she continues his "widow." This clause followed by the conjunction "and" indicates an addition to the time fixed in the previous modifying clause, and not a subtraction from or shortening of that time, so that she under this item holds the property not only so long as she continues his widow, but in case she had remarried prior to the time the youngest child became of age she would have continued, under the terms of the will, in possession of the property until that time. Had the testator transposed the adverbial clauses and said "until my youngest child shall be of age and so long as she continues my widow" it would not be claimed that her estate terminated upon the youngest child's becoming of age. How can it be claimed that

by changing the order of two adverbs the meaning can be changed? Such a claim is contrary to all rules of construction.

Such being the clear meaning of the language used in the first item, we find that Item II is inconsistent with this provision and can not be reconciled with it, accepting the ordinary meaning of the language there used. But so far as the widow is concerned Item I is the dispositive clause of the will. The manifest purpose of Item II is to provide what shall be done with the property at the termination of the estate given to the widow by the first item.

It is the duty of the court, where provisions of a written instrument are repugnant and irreconcilable, to attempt to reconcile them if possible.

The youngest child long since became of age and the widow is now old and has never remarried. Under the provisions of the first item the only restriction upon her right to a life estate in the property is her remarriage, which is a very remote possibility. But according to the terms of Item II, the youngest child having arrived at age and the two clauses being connected by the word "or," the property is now to be sold and the proceeds divided according to the statutes of descent and distribution.

Since the first item states clearly the time during which Mrs. Gould shall continue to hold this real estate, and since in our view the purpose of the second item is primarily to provide what shall be done with the estate when this time arrives, it is the duty of the court to so construe the second item that it will not defeat the devise made to the widow in the first item. In other words, where same can be done, it is the duty of the court to reconcile two conflicting portions of a will. We find that we can so reconcile these provisions by substituting in the first line of the second item the word "and" for "or" so that it will read "when the youngest child arrives at full age, *and* in case my wife Martha should again marry, it is my will," etc. This makes the two provisions of the will entirely consistent and carries out, as we think, the intention of the testator. It certainly carries out the intention as clearly expressed in the first item as before stated, and its language should control in the determination of the rights of the widow, because it is in that item the testator provides for her.

1914.]

Hamilton County.

There is abundant authority for the substitution of the word "and" in order that the language of the two parts may be reconciled. *Ely v. Ely*, 20 N. J. Eq., 43, 48; *Courter v. Stagg*, 27 N. J. Eq., 305; *East v. Garrett*, 9 S. E., 1112, 1117; *Sayward v. Sayward*, 7 Me., 211, 216.

The petition is dismissed.

JONES, O. B., J., dissenting.

The rule for the construction of a will in Ohio is well stated in the syllabus of *Townsend v. Townsend*, 25 O. S., 477, as follows:

"1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.

"2. Such intention must be ascertained from the words contained in the will.

"3. The words contained in the will, if technical, must be taken in their technical sense, unless it appear from the context that they were used by the testator in some secondary sense.

"4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it.

"5. If a dispute arises as to the identity of any person or thing named in the will, extrinsic facts may be resorted to, in so far as they can be made ancillary to the right interpretation of the testator's words, but for no other purpose."

The purpose of making a will is to express the intention of the testator and the object of construing it is to ascertain that intent, but this must be gathered from the words as used. The inquiry is not, what thought did the testator wish to express, but, what thought has he here expressed by the words of his will. See 1 *Redfield on Wills*, 433:

"The first and universal qualification of this rule is, that it is the intention of the testator expressed in his will which is to govern, and this must be judged of exclusively by the words of the instrument as applied to the subject-matter and the surrounding circumstances."

Item I and Item II of the will of Richard Gould, which are quoted in the majority opinion, *supra*, dispose of his entire property, and in my opinion contain no ambiguity, but are perfectly

clear in their meaning without any necessity for changing the position of clauses or substituting any word for another. They must be read together in order to effect the disposition of the property.

The first clause gives to the wife all the property to "have and hold * * * so long as she continues my widow, and until my youngest child shall be of age." The two final clauses of Item I are adverbial in character and modify or fix the time which she is to have and hold the property. She is to hold it during her widowhood until the youngest child shall be of age.

When Richard Gould died all of the children were minors. This language entitled the widow to hold the property until the youngest child became of age unless she should marry before that period. Item I does not go beyond fixing the time of her holding, but Item II clearly terminates such holding, (1) "when the youngest child arrives at full age," or (2) "in case my wife Martha should marry again." Upon the happening of either of these events Item II directs that the "real estate and whatsoever personal property may be remaining be divided between my wife and children according to law," etc. It seems therefore clear that upon the remarriage of the widow she would cease to hold all of the property and it should be immediately divided between the wife and children according to the law for the distribution of estates of intestates. In case she did not marry during that time, this division is provided for upon the date of the youngest child arriving at majority.

To my mind the language of this will admits of no other construction. The disposition made by Richard Gould of his property was possibly not favorable to his wife in putting upon her the payment of his debts and the rearing of his family of young children and giving to her an estate in his property only until the youngest child became of age, or until her remarriage if she remarried before that time, but if she was not satisfied with the provision made for her, she had under the law the right to refuse to take under the will, and to take the provision fixed for her by law in such cases. She did, however, take under the will, and in my opinion, her children had the power to demand partition in accordance with the second item of the will at any time

1914.]

Hamilton County.

they saw fit after the majority of the youngest child. The fact that they did not seek partition for a number of years after that date, does not in any way take away their right to ask it whenever they may choose, and no act is shown by the evidence that would amount to an estoppel against such right.

The rule as to changing words of a will is laid down in Vol. I, *Jarman on Wills*, 6th Ed., 599, in the following language:

“To alter the language of a testator is evidently a strong measure, and one which, in general, is to be justified only a clear explanatory context. It oftens happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough; it must be apparent not only that he has used the wrong word or phrase, but also what is the right one; and, if this be clear, the alteration of language is warranted by the established principles of construction.”

I do not think that the context in this case warrants the court in changing the language as is done by the majority of the court in order to support their construction, and to uphold my opinion I take the liberty of quoting the syllabus in each of two cases relied upon by the majority, as follows:

Ely v. Ely, 20 N. J., Eq., 43:

“1. After making a bequest to his wife, the testator added these words: ‘In case she should lose any part of her property before mentioned, and need more than she has of her own to support and maintain her comfortably, then, and in that case, so much of this money deposited and accumulated as shall need for her comfortable support, I order my executors to draw and pay to her, yearly or half yearly.’ The widow needing more than she had of her own to support herself comfortably, though she had lost none of her property, filed a bill for the construction of this clause. *Held*: That having lost none of her property, she was not entitled to any part of the bequest.

“2. ‘And’ will be construed ‘or,’ only to effect the evident intent of the testator, never to gratify the wishes or desires of a legatee, or to effect what might, in itself, seem more just or reasonable.

“3. There is no power to change the words in a will unless such change is necessary to effect the intent of the testator, apparent on the face of the will or from surrounding circumstances.

"4. The legatee seeking a construction of the will to gratify her own wishes, and against the obvious intent of the testator, bill dismissed; legatee to pay her own costs."

Courter v. Stagg, 27 N. J. Eq., 305:

"1. Testatrix devised her residence to her daughter, for her sole use and benefit, for so long a time as she might remain single and unmarried, or until such time as in her judgment she might deem it advantageous to sell and dispose of the same. The daughter is married. *Held*, upon bill filed for construction of the will, that the intention was that the daughter should have the residence until she either married or deemed it advantageous to sell, whichever should first happen; and the daughter having married, the executors have power to sell, and it is their duty to exercise it.

"2. Plain, clear words, read in their ordinary sense, must always govern, in searching for the intention of a testator, unless repugnant to other words, equally plain and clear, in another part of the same will.

"3. Courts sometimes, in attempting to give effect to a testator's intention, displace 'or' and substitute 'and,' and also put 'or' where the testator has written 'and,' but such departure from the words of the will are never made except it is clear they are necessary to give effect to a clear purpose of the testator.

"4. All doubts must be resolved in favor of the testator's having said exactly what he meant."

DURATION OF TEMPORARY APPOINTMENTS BY THE MAYOR.

Court of Appeals for Hamilton County.

EDWARD S. KEEFER ET AL V. STATE OF OHIO, ON RELATION OF
JAMES J. FITZGERALD.*

Decided, September 26, 1914.

*Civil Service—Tenure of One Appointed to the Municipal Service to
Meet an Emergency—Section 4488.*

Under the rules of the Civil Service Commission of Cincinnati the
tenure of one appointed to the municipal service to prevent the

*Affirming *State, ex rel Fitzgerald, v. Keefer et al*, 16 N.P.(N.S.), 145.

1914.]

Hamilton County.

stopping of public business or to meet an extraordinary emergency, continues until such time as the commission certifies suitable persons from an appropriate eligible list to fill the vacancy.

Walter M. Schoenle, City Solicitor, and *Charles A. Groom*, Assistant City Solicitor, for plaintiff in error.

Moulinier, Bettman & Hunt, contra.

JONES, O. B., J.; JONES, E. H., J., concurs; SWING, P. J., dissents.

By virtue of Section 4488 the mayor had the power and it was his duty to make temporary appointment such as that of the relator below, if it were necessary, to prevent the stoppage of public business or to meet extraordinary exigencies; he had no other right to make such an appointment, and under the general rule of law his official acts must be presumed to be legal. Under Section 74 of the rules of the civil service commission of Cincinnati such temporary appointment continued until such time as the commission could certify persons from an appropriate eligible list to fill the vacancy. It is conceded by both sides that no such list has been certified. The name of the relator was therefore properly upon the payroll, and it was the duty of the civil service commission to give the certificate required by statute to enable the payment of his weekly wages.

The questions raised in the case have been fully discussed in the opinion of the court below, and we agree with the conclusions therein stated and do not deem it necessary to enter upon further discussion of same.

We find no error in the judgment of the court below, and the judgment is therefore affirmed.

**SUFFICIENT EVIDENCE TO ESTABLISH A TRUST IN
REAL PROPERTY.**

Circuit Court of Cuyahoga County.

JOHN F. LIEBLEIN v. JACOB LIEBLEIN AND BRIDGET LIEBLEIN.*

Decided, January 26, 1905.

Evidence Sufficient to Establish a Trust.

In an action by a son to establish a trust in property voluntarily conveyed by himself and his sister to his father and by the father conveyed without consideration to the sister, the testimony of the principal parties being in direct conflict, but that of plaintiff consistent and reasonable and supported in important details by the testimony of a disinterested witness, while that of the sister was incredible, given in a manner not inspiring confidence, and was unsupported except by the father who was seventy-eight years old and appeared to be under the domination of his daughter, *Held*: That the evidence was sufficiently clear and convincing to establish a trust.

Foran & McTighe, for plaintiff.*Hart, Canfield & Croke*, contra.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Bridget Lieblien died in 1897 leaving four parcels of real estate and certain money in the bank. Plaintiff is her son; defendant Jacob Lieblein, widower and father of plaintiff; Bridget F. Lieblein is the sister of plaintiff. The brother and sister inherited their mother's estate, subject to their father's dower therein.

July, 1898, the son and daughter deeded the real estate to their father; the deeds were absolute upon their face without reservation of any kind, and defendants claim that by said deeds a gift to the father was intended.

Plaintiff claims that as to his interest the deeds, while absolute in form, were intended to vest the title to the property in the father, in trust, to keep the estate intact, manage it, make an

*Affirmed without opinion, *Lieblein v. Lieblein*, 74 Ohio State, 496.

1914.]

Cuyahoga County.

advantageous sale to the city for boulevard purposes, if possible, and render to the son his share, in money or lands, at any time upon request, also accounting to him for rents and profits.

The father, after he received said deeds, sold one lot to the city for \$2,100, receiving the proceeds thereof, which he turned over to the daughter, and in April, 1901, he deeded the other lots, three in number, to the daughter as a gift to her, as she and the father claim.

Thereupon plaintiff demanded his share of the property and an accounting and upon its being denied him, brought this suit to declare a trust in said premises and for an accounting.

We have heard the witnesses in this case, it being heard upon appeal, and the law requiring that in such cases the evidence establishing the trust and its terms must be clear and convincing, we have found much difficulty in adjusting the equities between the parties.

There is an irreconcilable conflict between the story told by plaintiff and his witness Bogue, and the story told by the defendants. Both can not be true; one or the other is absolutely false.

The testimony of the plaintiff is consistent and reasonable; many details of it are substantiated by Bogue.

The story told by the defendant sister is incredible; we do not believe it. Her manner on the stand and evasion of questions asked by the court discredit her.

It is with regret that we are compelled to disregard the testimony of the father. He is seventy-eight years old, quite feeble and resides with his daughter, refusing to have anything to do with his son. We think his will is subordinated to hers and his testimony must be weighed in view of his surroundings.

We have concluded to grant the prayer of the petition and order that one-half of the unsold real estate be conveyed to him, subject to the father's dower interest therein. As to the accounting, plaintiff is entitled to half of the proceeds of the lots sold, less his father's dower interest therein. We do not think plaintiff has established his right to an accounting of the rents and profits.

Decree may be drawn as indicated. Judgment for plaintiff

**VALIDITY OF THE ACT ESTABLISHING THE TENURE
OF FIREMEN.**

Circuit Court of Lorain County.

ED ESSEX v. E. A. AULT.

Decided, October 8, 1904.

*Municipal Corporations—Constitutional Law—Firemen in Office at Time
Municipal Code Went Into Effect Can Only be Removed Under
Provisions of that Act.*

1. The chief of a volunteer fire department elected by the city council under an ordinance of the city is "an officer" within the meaning of Revised Statutes, Section 8, and continues in office until his successor is elected or appointed and qualified.
2. Section 167 of the Municipal Code providing that no fireman serving in the fire department of any city of the state at the time that act went into effect should be removed or reduced in rank or pay except in accordance with the provisions of that act, is constitutional.

WINCH, J.; HALE, J., and MARVIN, J., concur.

This is a proceeding in *quo warranto*, brought to determine whether relator or respondent is entitled to fill the office of chief of the fire department of the city of Lorain.

From the agreed statement of facts it appears that before the enactment of the new municipal code, the city of Lorain had a volunteer fire department, not under the merit system, the chief officer of which was known as the chief engineer of the fire department, with duties and authority the same as prescribed for the chief of the fire department by the new code. By ordinance 91 it was provided that said chief engineer should be elected annually by the council at the first regular meeting of said council in May of each year, and on May 5th, 1902, the relator was so elected by the council; on May 9th, 1902, the relator received a certificate from the city clerk of his election "to the office of fire chief for a term of one year," and on May 13th, 1902, qualified and entered upon his duties as such officer.

The new code went into effect May 4th, 1903, but no board of public safety was appointed for the city of Lorain until July 3d, 1903, when it was appointed by the Governor and organized within three weeks thereafter.

The city council never passed any ordinance classifying the employees of the fire department, and the board of public safety never conducted any civil service examination, but on December 18th, 1903, the mayor, in writing, requested of the board of public safety a list of names from which to select a chief of the fire department, and a list was given him by said board, containing the names of one member of each of the three hose companies who had served longest in the department; this list did not contain relator's name, but it did contain respondent's name, and the mayor selected the latter as chief of the fire department, and on December 23d, 1903, appointed him as such, the appointment to take effect January 1st, 1904, and certified said appointment to the board of public safety.

Relator was never removed from office in the manner provided in the code, but acted as fire chief until January 1st, 1904, on which day respondent qualified as such, entered upon his duties and has been serving as such ever since.

Respondent further claims and introduced evidence for the purpose of proving that on the morning of May 4th, 1903, the mayor of the city called relator to his office, told him that his term of office was up, asked him if he would accept a temporary appointment, and being told by relator that he would, thereupon appointed him temporary chief of the fire department. This is denied by relator, and for how long a time he was appointed temporary chief does not appear.

Relator bases his claim to the office upon the fact that he was in office at the time the new code took effect, never was removed as provided by said code and that he is entitled to continue in office until so removed, by virtue of Section 167 of said code, the last paragraph of which, omitting words not relevant to this case, provides as follows:

"No * * * fireman * * * serving in this * * * fire department of any city of the state at the time this act goes into effect shall be removed or reduced in rank or pay, except in accordance with the provisions of this act."

Respondent says, first: that relator was not in office when the code took effect; second, even if he was, the law continuing him in office is unconstitutional; third, even if in office and the law constitutional, the board of public safety never did that which is required to be done to give him the right to claim that the board had appointed him.

As relator makes no claim that the board appointed him, the third contention may be dismissed without further consideration.

He was elected May 5th, 1902, under an ordinance which provided that the chief should be elected annually, which would intend that he was elected for one year or until May 5th, 1903, or at least until the council on the first Monday of May, 1903 (May 4), should elect his successor; as the council met in the evening, that would be until the evening of May 4th, 1903; but when the council met that evening it could not elect a successor to him because the new code had already taken effect, was in force, and took away from the council the right to elect a fire chief.

The council in fact did not attempt to elect a successor to relator.

That relator was an officer whose duties are regulated by law, not under the control or direction of any superior in his department, is admitted by counsel for respondent. If so, he was an "officer" within the purview of Section 8, Revised Statutes, which provides:

"Any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the Constitution or laws."

Not having otherwise provided for the office of relator, and no successor having been elected or appointed before the new code took effect, he was then in office and entitled to the benefits of said Section 167 if the same is constitutional, and unless the temporary new appointment testified to, affects the case. This conclusion is in accord with the decision of this court in the case of *State, ex rel John Coon, v. George E. Myers*, recently decided in Cuyahoga county, and likewise is in accord with Section 213 of the municipal code.

1914.]

Lorain County.

As to the temporary appointment claimed to have been made on May 4th, 1903: having arrived at the conclusion that no vacancy on that day existed in the office of fire chief, we are unable to see how the mayor, or anybody else, could make an appointment, temporary or otherwise, to an office which was not vacant.

Second. It is claimed that Section 167 of the municipal code, in so far as it provides that no officer, etc., serving in the police or fire department of any city of the state at the time the code took effect should be removed, except in accordance with the provisions of the code, is an exercise of appointing power by the General Assembly and is in conflict with Section 27, Article II of the State Constitution.

With this contention we can not agree; the reasons against it are fully stated by Judge Summers in the case of *State, ex rel, v. Hall*, 25 C. C., 762.

It follows that relator is entitled to the relief he prays for, and the same is granted.

**DAMAGES SOUGHT FOR TRANSPORTATION OF HOGS
INFECTED WITH CHOLERA.**

Circuit Court of Lorain County.

GEORGE W. MORTON v. ROBERT MURRY.

Decided, November, 1904.

*Trials—Failure to Ask Instructions to Disregard Evidence Properly
Admitted Waives Error.*

Failure of a defendant to ask the court to instruct the jury to disregard evidence, which was properly admitted as against a co-defendant who was subsequently dropped from the case, waives any error of the court in neglecting to so instruct the jury.

WINCH, J.; HALE, J., and MARVIN, J., concur.

This was an action brought by the defendant in error against plaintiff in error for damages sustained by reason of the wrongful transportation of hogs infected with cholera, whereby

defendant in error's hogs became infected and some of them died. There was a verdict and judgment for plaintiff below.

Three errors alleged are relied upon for the reversal of this judgment.

1. It is claimed that the verdict is not supported by the evidence. A careful reading of the evidence convinces us that the evidence fully sustains the verdict.

2. There were two defendants in the original action: Morton, plaintiff in error, who owned and transported the hogs, and Knauss, who owned the farm adjoining defendant in error's to which the hogs were transported. During the trial of the case testimony was admitted as to the admissions of Knauss; these were properly admitted as against him, he being a defendant: they were not admissible against Morton.

The court in its charge directed a verdict in favor of Knauss and he was thereby let out of the case, and properly. But the court neglected to caution the jury as to the inadmissibility of Knauss' admissions as against Morton. Had request to so charge been made, it would have been error to have refused it, but as no such request was made, although the court inquired of defendant's counsel if further requests were desired, we are inclined to rule there was no error herein.

Certainly there was no error in the original admission of the evidence.

3. We think the charge fair and very favorable to defendant below. The construction given by the court of the statute, Section 4211, sub-sections 6-7, was all that the defendants were entitled to.

The court held that the action was brought under the statute, and was founded upon the negligence of the defendant, and held that to recover under the statute the plaintiff must prove not only that the defendant transported hogs infected with cholera, whereby the same was communicated to plaintiff's hogs to his damage, but that the plaintiff must show that the defendant knew his hogs were so infected at the time he transported them. We find no error in the charge.

Judgment affirmed.

1914.]

Lucas County.

**ALLOWANCE OF ALIMONY ON GROUNDS
SUBSEQUENTLY ARISING.**

Court of Appeals for Lucas County.

HERMA M. CADWELL v. FRANK W. CADWELL.

Decided, July 7, 1913.

Divorce and Alimony—Refusal of Alimony to Wife in Another Jurisdiction—Conclusive Only Under Conditions then Existing.

Where, in prior actions in another jurisdiction in this state, the courts have held in suits between the same parties for divorce and alimony, that the separation of the parties was caused by the fault of the wife, but that she had not been guilty of willful absence for three years, nor of gross neglect of duty, nor extreme cruelty, and have adjudged that the husband should make a fixed monthly payment for the support of the children, but refused an allowance of alimony to the wife, such adjudications are final and conclusive as to conditions then existing, but do not preclude an allowance of alimony on grounds subsequently arising.

*Marshall & Fraser and Berkeley Pearce, for plaintiff.**Richard H. Lee, contra.*

RICHARDS, J.; KINKADE, J., and CHITTENDEN, J., concur.

Appeal from common pleas court.

This is an action brought by the plaintiff against her husband for the purpose of securing an allowance of alimony. The parties to this action have had a great deal of litigation in the courts of Cuyahoga county over their marital troubles, two actions for divorce having been brought in that county by the husband and divorce refused in each case. The first of these actions resulted in an allowance of alimony to the wife, from which allowance the husband appealed to the circuit court, which latter court on a hearing of the case, in the decree rendered December 16, 1911, refused the wife alimony but gave her the custody of the two children of the parties and ordered the husband to pay to her for the support of the children \$30 on the first day of each month. The prayer for alimony was, by the circuit court, specifically denied.

It appears from the evidence in this case that Mrs. Cadwell resided up to the time of her marriage to the defendant, which occurred on June 15, 1898, in this county and that after their marriage they resided in the city of Cleveland, which city had always been the home of the husband. In the year 1909 she left him, taking the two children, and came to live with her parents in Lucas county, and has continued to reside here from that time. Certain matters must be considered to have been adjudicated between these parties and not now open to further discussion or consideration. We must take it for granted as held by the circuit court in Cuyahoga county that the separation of the parties in the year 1909 was occasioned not because of habitual drunkenness of the husband as was claimed by the wife but by an ill-grounded jealousy on her part and that as held in the decision of that court the evidence was not such as required her to leave him permanently. In the second divorce case brought by the husband, after the decision of the circuit court to which reference has just been made, the common pleas court held in a decision rendered May 24, 1913, that she had not been guilty of wilful absence from her husband for three years nor of gross neglect of duty or extreme cruelty towards him. These matters so adjudicated by the courts in that county will not be opened up for further examination by this court.

The plaintiff in her petition for alimony in this county avers that her husband has been guilty of gross neglect of duty in failing to provide for her since the decision rendered by the circuit court and since her offer to return and live with him and her ineffectual attempt to bring about a reconciliation between them. It is insisted by counsel for Mr. Cadwell that this court has no jurisdiction to allow alimony to the wife because of the decree rendered in the circuit court in Cuyahoga county. That court after clearly recognizing the distinction existing between alimony on the one hand and an allowance for the support of the children on the other, as already stated, specifically refused alimony under the facts then existing. Mrs. Cadwell was then claiming alimony by reason of the alleged habitual drunkenness of her husband, and the court found that the drunkenness was

1914.]

Lucas County.

not of such frequency as to be habitual, and therefore and for that reason refused to allow her any alimony. Her present claim is based upon occurrences since the date of that decision. It is not the law that the former decision is an adjudication that no cause for the allowance could thereafter arise. The allowance which was made by that court for the support of the children is in no sense of the word a provision for her by way of alimony.

We call attention to *Pretzinger v. Pretzinger*, 45 Ohio St., 452, 459, where the distinction is clearly pointed out by the Supreme Court. Indeed it was held by the Supreme Court in the case of *Rogers v. Rogers*, 51 Ohio St., 1, that an allowance for the maintenance of minor children was not appealable. While the law has always been in Ohio that the allowance of alimony is appealable, by act, 90 O. L., 186 (Section 8035, General Code), the right to appeal from the allowance for the maintenance of children was first granted. I only call attention to this decision and the latter statute to indicate the distinction between alimony and an allowance for the maintenance of children. Our Supreme Court in *Fickel v. Granger*, 83 Ohio St., 101, 106, says that "Alimony is an allowance for support, which is made upon considerations of equity and public policy. * * * It is based upon the obligation, * * * that the husband must support his wife." We are then at liberty to determine the claim of the wife to alimony in this case and render such decree as the facts may justify, unhampered by the refusal of the circuit court in Cuyahoga county to allow her alimony on the facts existing at the time of the decision in that court, in December, 1911.

The evidence tends to show that subsequent to said decision she, in good faith, sought a reconciliation with her husband and offered to return and live with him and resume their marital relations. The husband strenuously insists that such offer was not made in good faith but only for the purpose of enabling her to secure a portion of his property. When asked on the witness stand to state what would satisfy him that she was acting in good faith in making her offer, he was unable to state or at least failed to state what would be sufficient.

"A company or organization may be organized to transact the business of life or accident, or life and accident insurance on the assessment plan for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to families" or heirs of the deceased members of such company or association.

The constitution of said association provided:

"Article II—Object. Sec. 1. The object of this association shall be to provide assistance for the families or legal heirs of a deceased member."

Article IV, Section 2, provided:

"The sum so paid shall be held as a death benefit fund to be paid to the family or whoever the next deceased member may have elected, immediately upon satisfactory evidence of such death having been furnished to the board of trustees."

Under the provisions of the statute and of the constitution of this association there can be no question but that the death benefit provided would be payable to the widow, Clara L. Johnson, the deceased having left no children; but it is claimed that the widow is not entitled to this benefit by reason of the fact that the said Clifford E. Johnson had designated his brothers the beneficiaries of his claim. Prior to the marriage of Clifford E. and Clara L. Johnson this designation had been made by Clifford E. Johnson, so that the question is, whether or not the widow—notwithstanding the brothers had been designated—is entitled to the claim, or whether by reason of the designation the brothers are entitled to the fund.

If Clifford E. Johnson had not married Clara L. Johnson there would be no question but that the designation of the brothers would be binding upon the association, and they would be entitled to the benefit because they would come under the provisions of the law and the constitution, but we are of the opinion that the purpose of the law and the purpose of the constitution of this association was primarily to raise a fund for the families of the deceased, and that it was not within the power of said Clifford E. Johnson to designate others than

1914.]

Huron County.

the members of his family as the beneficiaries of this fund. At the time of his death the family of Clifford E. Johnson consisted of himself and his wife, the brothers at that time were not members of his family within the meaning of the law, and therefore not being members of the family, his designation made at the time when it was proper became inoperative as against the provisions of the law and the provisions of the constitution of the society, and the court hold that the widow alone is entitled to the benefit provided by the association.

DAMAGES FOR WANTON TRESPASS.

Circuit Court of Huron County.

MILDRED G. HOURAN V. CHARLES WHITNEY ET AL.*

Decided, October 5, 1912.

Trespass—Finding of Not Guilty of Intentional Wrongdoing or Actual Malice Not Inconsistent with a General Verdict for Plaintiff which Includes Punitive Damages.

In an action to recover damages for an alleged wanton and malicious trespass on real estate, in which the jury returns a general verdict for the plaintiff, and assesses the actual damages and the punitive damages separately, and further states in answer to an interrogatory submitted, that it does not find the defendants were guilty of intentional wrongdoing or actual malice, the plaintiff is entitled to a judgment for the full amount of the general verdict, inasmuch as such special finding does not exclude a conclusion that the defendants acted wantonly, or in reckless disregard of the rights of the plaintiff, and it is not, therefore, irreconcilable with the general verdict.

C. P. & R. D. Wickham, for plaintiff in error.

A. V. Andrews, contra.

RICHARDS, J.; KINKADE, J., concurs; WILDMAN, J., not sitting.

Error to common pleas court.

In the court of common pleas, Mildred G. Houran brought an action against the defendants to recover damages for an alleged wrongful, wanton and malicious trespass committed upon

*Affirmed without opinion, *Whitney v. Houran*, 90 Ohio State, —.

her premises. Issues were made up between the parties and the case tried to a jury, resulting in a general verdict in favor of the plaintiff for \$210.

The trial court, at the request of the defendants, submitted to the jury certain special interrogatories to be answered by them in the event they returned a general verdict. The jury in response to the first interrogatory answered that they returned \$10 as actual damages caused by the trespass; and in answer to the second interrogatory that they returned the sum of \$200 by way of punitive damages.

The fourth interrogatory submitted reads as follows:

“4. Do you find that any of the defendants on the evening of March 16, 1908, were guilty of intentional wrongdoing or actual malice toward the plaintiff? Answer: No.”

After the rendition of the verdict, the case came on to be heard in the trial court upon the motion of the plaintiff for a judgment in her favor on the general verdict for the sum of \$210 and costs, and the motion of the defendants that the court render a judgment on the general verdict, as modified by the special findings and the answers of the jury, in the sum of \$10 only. The court found and adjudged that the general verdict to the extent of \$200 was inconsistent with the special findings and irreconcilable therewith, and rendered judgment for \$10 only, thus eliminating the amount of \$200, allowed as punitive damages.

The plaintiff insists in this court that the answers to the interrogatories are not so irreconcilably inconsistent with the general verdict as to justify the action of the trial court in refusing to enter a judgment for \$210 and in entering a judgment for \$10 only.

It will be noted that by the answer of the jury to interrogatory No. 4, they find only that the defendants were not moved by “intentional wrong-doing or actual malice towards the plaintiff.” It is insisted by counsel for the defendants that this answer precludes the allowance of any punitive or exemplary damages.

Many fine distinctions have been drawn between actual malice, express malice, and malice in fact on the one hand, and implied

malice, imputed malice, constructive malice and malice in law on the other hand, but into this fruitful field of discussion it will not be necessary to enter.

A careful examination of the question raised by the record in this case leads us to the conclusion that interrogatory No. 4 is too restricted in its language to forbid the allowance of exemplary damages.

During the argument, reference was made to *Mauk v. Brundage*, 68 Ohio St., 89, but the Supreme Court was passing only upon the phrase "express malice" in that case, and was not considering whether exemplary damages could be allowed in cases of the kind under consideration upon a finding of any circumstances other than express malice.

Reference was also made during the argument to the case of *Young v. Telephone & Telegraph Co.*, an unreported case tried in the court of common pleas of this county, affirmed by this court and affirmed by the Supreme Court, without report, in *American Tel. & Tel. Co. v. Young*, 78 Ohio St., 399. An examination of the record in that case, which was one of alleged wanton and malicious trespass upon real estate, shows that the charge of the court authorized the jury to award punitive or exemplary damages, if they found the acts were done "wantonly or maliciously or with a reckless disregard of plaintiff's rights." While it may be true that neither the circuit court nor the Supreme Court passed upon that language, we believe it to be a correct statement of the rule under which a jury would be justified in allowing exemplary damages in a case like the one now before the court. It seems to be in accord with *1 Southerland, Damages*, 716, where the author says:

"There is much authority for allowing damages beyond compensation for torts whenever a case shows a wanton invasion of the plaintiff's rights or any circumstances of outrage or insult; whenever there has been oppression or vindictiveness on the part of the wrongdoer; whenever there is a willful malice or reckless tort to person or property."

The Century Dictionary defines "wanton" as characterized by extreme recklessness; also recklessly disregarding of rights or consequences.

The scope of this interrogatory is not broad enough to cover a case in which the jury find that although the defendants may not have been moved by actual malice, yet they may have acted wantonly and with a reckless disregard of the rights of the plaintiff. It appears to the court, therefore, that interrogatory No. 4 and the response thereto of the jury are not so irreconcilably in conflict with the general verdict as to have justified the court in refusing to enter a judgment for the plaintiff for the amount of the general verdict. Well established practice requires that it must appear that the special findings are in a legal sense irreconcilable with the general verdict and that this conflict must be clear before a court will be justified in disregarding the general verdict. *Davis v. Turner*, 69 Ohio St., 101, 102.

The judgment of the court of common pleas will be reversed and, proceeding to render the judgment which that court should have rendered, judgment will be entered in favor of the plaintiff upon the general verdict.

PROOF OF GUILT UNDER AN INDICTMENT FOR ROBBERY.

Circuit Court of Summit County.

JOHN McLAUGHLIN v. STATE OF OHIO.

Decided, April, 1905.

Evidence—Trials—Statements of Third Parties in Presence of Accused: When Admissible—Record of Whole Case Before Reviewing Court—Immaterial Evidence Admissible to Rebut Like Evidence—Evidence Known to Party Not Newly-Discovered.

1. Statements of third persons to the accused, charging him with crime and his conduct or replies in response thereto, are admissible in evidence.
2. Where a motion for a new trial is overruled and no exceptions taken thereto and a second motion for a new trial made on the ground of newly-discovered evidence is also overruled, to which exceptions are taken and the case taken on error to the circuit court, the record of the entire case is before the court for review.
3. Where immaterial evidence has been admitted on behalf of one party similar evidence then becomes admissible on the part of the other party to explain or rebut it.
4. A new trial will not be granted on the ground of newly-discovered evidence, simply because the counsel for the accused did not know

1914.]

Summit County.

of the existence of the evidence, when it was possible for the defendant to communicate it to him at any time previous to the trial, and he failed to do so.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Plaintiff in error was arrested on May 15th, 1903, charged with having participated with two others in robbing one Robert Spinner. He was incarcerated in the county jail and remained there until his trial at the September term of the Common Pleas Court of Summit County, and on October 28th, 1903, was found guilty by the verdict of a jury. October 29th, 1903, he filed a motion for a new trial, which on November 4, 1903, was overruled by the court, and he was thereupon sentenced to two years in the penitentiary. No exceptions to the overruling of this motion were taken, but on November 5th another motion for a new trial on the ground of newly-discovered evidence was filed, accompanied by many affidavits setting forth, in substance, that at the time the robbery was committed the accused was so addicted to and under the influence of intoxicants and drugs that he was not accountable for what he did, and that this was unknown at the time of the trial and could not, with reasonable diligence, have been discovered.

It appears from these affidavits that the young man was of good family, was a member of the bar of New York, and had been assistant corporation counsel for New York City, sustaining a good reputation; that on Christmas day, 1901, he met with an accident, was taken to a hospital, was given narcotics to allay his pain, became used to taking morphine, gradually became a slave to the habit, indulging in drinking whiskey and absinthe to excess, descended the social and moral scale until he became a tramp, wandering about the country, associating with low and vicious characters, suffered from his excesses to such an extent that his moral and intellectual faculties were blunted, became a wreck; in fact, frequently being in prison, sometimes at his own request that he might be restrained from himself and sobered up. He made known none of these facts to counsel assigned to defend him, nor did any of his family know that he was charged with crime until after he had been convicted thereof.

It may fairly be supposed that the numerous affidavits to sustain the last motion for a new trial were procured in an effort by the parents of this young man to save him and themselves from the disgrace of his commitment to the penitentiary.

This last motion for a new trial was overruled, exceptions taken, and bill of exceptions prepared and filed with a petition in error in this court.

The prosecuting attorney claims that no exceptions having been taken to the overruling of the first motion for a new trial, nothing is before us for review except the ruling of the trial judge upon the last motion for a new trial, but we hold that the entire case is before us for examination of such rulings as the trial judge made that were excepted to by the accused at the trial. These matters will be examined in their order.

First. It is claimed that certain declarations of the prosecuting witness, Spinner, made in the presence of the accused, should have been excluded. It appears that McLaughlin and one of his companions were arrested in the evening shortly after the commission of the crime alleged, and taken by two officers, Goodenberger and Benson, to the boarding house of the prosecuting witness, Spinner, for identification by him. The questions and answers objected to referred to conversation of the accused at that time, narrated by Goodenberger, and are as follows:

“Q. State what was said? A. We asked Spinner in effect, probably not in the same words, whether these were the parties that robbed him, and he pointed at McLaughlin and said he was one, and he looked at Macklin, Macklin was leaning up against a showcase there, and first he said he didn’t look tall enough, and after Macklin straightened up and turned around so he could get a good look at him, he said he was one of the other men.

“Q. Do you remember any other conversation that occurred in the presence of McLaughlin either between you and McLaughlin or Spinner and McLaughlin in that house? A. Yes, sir.

“Q. You may relate it? A. Just as soon as we got in the house McLaughlin said, ‘I do remember meeting a colored man on some street over here and asking him for some tobacco.’”

1914.]

Summit County.

It appears that without objection Spinner himself, when on the stand, testified to the same conversation as follows:

"Q. Now, Robert, what is the fact as to whether or not you identified McLaughlin there as one of the fellows? A. As soon as I seen him I knowed him. I said, 'You are the fellow that got my tobacco.' 'Yes,' he says, 'I did get the tobacco off a colored fellow.' I says, 'You are the man that robbed me.' 'No,' he says, 'I never robbed you. I got tobacco from a little colored fellow, but never robbed you.'"

Officer Benson's testimony on the subject is as follows:

"Q. Tell what was done, what took place? A. Goodenberger told the lady right over there, asked her, 'Is Mr. Spinner here?' She says, 'I guess he went to bed.'"

"Q. Go ahead. A. She went up and got him and he come down. As soon as he come inside the door, as soon as he looked at McLaughlin, 'You are the one,' he said, 'That helped to rob me,' he says.

"Q. Who did he say that to? A. McLaughlin."

It thus appears that the accused at this time made a statement tending to show his connection with the crime. His acknowledgment that he had met Spinner about the time and place claimed by the latter, and asked him for his tobacco, was significant, tended to identify him as one of the robbers and was proper evidence for the consideration of the jury.

The rule that statements of third persons to the accused, charging him with the crime, and his conduct or replies in response thereto, are admissible, was laid down by this court in the case of *Moran v. State*, 11 C. C. 464, and affirmed by the Supreme Court. The opinion of the court by Judge Hale sets forth our views of this matter, and we believe fully applies to this case.

We, therefore, hold that there was no error in the admission of the testimony objected to.

Second, exception is taken to the testimony of Detective Doerler in which he gave a conversation with the accused a few days before his arrest, in which the detective claimed he ordered McLaughlin out of town. This testimony was incompetent, but it appears from the bill of exceptions that upon cross-examina-

tion of the defendant he was asked if Doerler had not ordered him out of town, and defendant, without waiting for the court to rule upon the question, answered "No." On re-direct examination the defendant testified to his conversation with Doerler and gave his version of it. In rebuttal the state called Doerler, who gave his recollection of the conversation, to which the defendant excepted.

We think that under these circumstances Doerler's testimony was admissible.

It has frequently been held that where inadmissible or immaterial or irrelevant evidence has been admitted in behalf of one party, similar evidence may be admitted to rebut it, and where part of an act or declaration is given in evidence by one party, the other party is entitled to inquire into the whole. 20 Am. Digest, 450, and cases cited.

It is said by Jones in the first volume of his *Law of Evidence*, Section 169, that the reason for this rule is, that it would be manifestly unjust, if one party is permitted to introduce irrelevant testimony, to prevent the other party from rebutting or explaining it. So it seems to us, though some courts have held that the introduction of immaterial evidence to meet immaterial evidence is within the discretion of the trial judge. *Treat v. Curtis*, 124 Mass., 348; *Fushbush v. Goodwin*, 25 N. C., 425.

In either view of the case there was no error in the admission of the testimony of Doerler, for which this case should be reversed.

It remains to consider the claim of plaintiff in error that the trial court erred in overruling the motion for a new trial, which was based upon the ground that there was newly-discovered evidence. The character of this so-called newly-discovered evidence has been given. The motion is based upon the fifth clause of Section 7350, Revised Statutes, which provides that a new trial may be granted for "newly-discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at the trial."

1914.]

Summit County.

Whether this evidence, if it had been submitted at the trial, would probably have changed the result is not necessary for us to determine, for we are of the opinion that the evidence set forth in the affidavits accompanying the motion does not come within the provision of the statute that it shall be "newly-discovered" and such that defendant "could not, with reasonable diligence, have discovered and produced at the trial."

That the accused just before he was arrested had been drinking to excess, and had been twice locked up for intoxication that he might sober up, was testified to by himself at the trial.

But it is claimed that the use of absinthe and morphine was not known to his counsel at the time of the trial. This may be so. It is also claimed that the particular characteristics of the use of such liquor and drug is to make their user and habitue secretive as to their use, deceitful, careless of results, forgetful and irresponsible. Such may be the case.

That counsel for the accused did not know of this evidence does not make it newly-discovered, if at any time previous to the trial, defendant, who must be presumed to know the most about it, was able to communicate it to him. *Isaacs v. People*, 118 Ill., 538; *Pace v. State*, 63 Ga., 159; *Russell v. Oliver*, 78 Tex., 11.

But was the defendant at the time of the trial able to communicate it to him?

It must be remembered that the accused was arrested May 15th, 1903, but not tried until October 28th, 1903, over five months later. During all that time he was in jail and must have materially recovered from any bad effects resulting from the use of intoxicants and drugs. There is no evidence that such was not the case. The affidavits all refer to his condition before and at the time he was arrested, and not to his condition at the time of the trial. He was an attorney and knew the value of such evidence.

He himself testified in the police court the morning after the robbery occurred, and again at his trial before the common pleas court. It appears from the counter-affidavits on the motion that he sat at the trial table with his counsel and made sugges-

tions to him as to the manner of conducting his defense. He argued his own cause to the jury. From these circumstances we must conclude that he was abundantly able to communicate all of the facts as to his previous habit and condition to his counsel, and offer them in evidence. That he did not do so was his own neglect, and upon this he can not base his right to a new trial.

The motion will be denied if the mover has been guilty of laches. *Moore v. Coates*, 35 O. S., 177.

It was held in the case of *Nesbit v. People*, 19 Col., 441, that:

“A motion for a new trial, on a charge of murder, for newly-discovered evidence, will not be granted where it consists of the professional opinion as to the mental condition of the defendant, and no efforts were shown to obtain it before trial.”

In the case of *Cooper v. State*, 122 Ind., 377, the court says:

“Where the defendant in a trial for murder testifies as to all the circumstances of the homicide, which occurred more than three years before, and seeks to justify it on the sole ground of self-defense, a new trial will not be granted on the ground of newly-discovered testimony, to the effect that defendant had been drinking to excess for several months before the homicide, and was on the verge of delirium tremens.”

The affidavits filed in this cause make a case very similar to the case of *People v. Hovey*, 30 Hun., 354, from which I quote as follows:

“The defendant was tried and convicted of murder in the first degree, for shooting his sister-in-law on April 20, 1892. There was present at the time of the shooting of the deceased, the defendant and his wife. The defendant was examined in his own behalf, and testified that the shooting was accidental, stating in detail how it occurred and what he did and said on that day.

“It appeared by the testimony of several of the witnesses, and to some extent by the testimony of the defendant himself, that he had been drinking for some days before the commission of the crime, and that he was intoxicated at the time of its commission. The conviction was affirmed by the general term on March 22, and by the court of appeals on July 5th, 1893.

1914.]

Summit County.

"On July 11th, 1883, the defendant moved for a new trial upon the ground of newly-discovered evidence. The affidavits which were made by public officers attached to the police force and prison force of New York, tended to show that the defendant was arrested on April 15th, 1882, and committed to prison for three days for intoxication; that at the time of his arrest and while in prison he talked wildly and acted violently, and so that it was necessary to confine his hands, and that at the time of his discharge he was not fully recovered from the effects of the liquor; that upon the day after his arrest for the homicide, the city physician visited him and found him in a highly nervous and excited condition, the result of the excessive use of alcohol; that he complained of being unable to sleep or control himself, which symptoms resulted from the abuse of alcohol and the deprivation of sedatives he had been in the habit of taking; that he was under treatment for these troubles for some two weeks; that in the opinion of the said physician at the time of such examination the mind of the prisoner was in such a condition that he was oblivious of his actions during the week preceding said examination. These facts were not communicated to the defendant's counsel until the latter part of June, 1883.

"*Held*: That it was not probable that the evidence, if received, would have changed the verdict.

"That the evidence had not been discovered since the trial, within the meaning of the said action, inasmuch as the facts of his arrest, confinement and sickness, must have been known to the defendant, although he might not have known the exact condition, physically and mentally, in which he was then, and that it was his duty to have made these facts known to his counsel, if he deemed them important; that the only fact newly discovered was that it might have been of some importance to himself, if evidence of these facts had been produced on the trial.

"That as the condition and mental operations of the defendant were questions necessarily involved upon the trial, the evidence was cumulative.

"That the failure of the defendant to produce the evidence upon the trial was due to his want of diligence."

In this state it has been held by the circuit court of the fifth circuit (11 C. C., 18), that:

"Motions for new trial, based upon newly-discovered evidence are usually addressed largely to the discretion of the trial court, and that court having passed upon the case in all its aspects, a reviewing court will not interfere with the action of the trial court, especially if it sees no ground for such interference."

We think this well states the law, and adopt it. Believing that the trial court properly overruled said motion, we find no error in its so doing.

Our attention has been called to the fact that the plaintiff in error for about a year had been imprisoned in the county jail, no part of which time counts as part of his sentence of two years in the penitentiary.

It has also been suggested that the young man has been rehabilitated, has overcome his bad habits, recovered from the use of drugs and stimulants and been sufficiently punished; that confinement in the penitentiary will not further reform him nor benefit him or society; that such confinement may have the opposite effect. While feeling the weight of these suggestions, we know of no jurisdiction this court has to reduce the sentence, and suggest that such representations should rather be made to the pardoning power, in which we have no part.

Judgment affirmed.

PROPER PLACE FOR MAKING TENDER OF PAYMENT.

Circuit Court of Lorain County.

FRED F. THOMAS V. JOHN WATT AND MARY WATT.

Decided, May 8, 1905.

Tender of Payment Must be Made at Residence of Payee.

Where no agreement as to place of payment is made, a tender, to be legal, must be made at the residence of the payee; and the fact that the obligor, through a misunderstanding, was at some other place for the purpose, will not excuse the failure to make a tender at the proper place.

F. F. Thomas and Clayton Chapman, for plaintiff.

E. H. & H. C. Johnson, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

Heard on appeal.

1914.]

Lorain County.

In this case we are asked to enforce the performance of a verbal contract between the parties for the sale of a farm in Lorain county, owned by the defendants.

There is no dispute as to the making of the contract and its terms. Plaintiff introduced evidence as to certain acts of part performance of the contract on his part, which he claims takes it out of the operation of the statutes of frauds, and while what he did is rather insignificant and is explained by defendants as referable to permission given by them to the doing of certain things which should be at plaintiff's risk, if the sale was not consummated—we are inclined to say that plaintiff is right upon this proposition.

There remains but one other thing or proposition in the case, and that is the question of tender. The contract provided that plaintiff should pay to defendants the consideration agreed upon by February 1st, 1903. That day came upon Sunday. The evidence shows that upon the Saturday before that day plaintiff went to the farm of defendants having with him a draft for \$1,500 drawn by the American Trust Co. of Cleveland upon the Colonial Trust Co. of New York, properly endorsed and made payable to plaintiff's order. He also had with him a deed properly drawn up to be signed by the defendants. Mr. Watt was away and he saw Mrs. Watt, showed her the draft and told her to go with her husband before one Crandall, a notary public or justice of the peace, and have the deed executed and plaintiff could go there and have the money with him. She said "all-right."

The next day, Sunday, plaintiff went to defendant's farm and saw Mr. Watt, or "the Captain" as he is called. As to what then occurred plaintiff testified in substance as follows:

"I told the Captain I had a New York draft (perhaps plaintiff showed it to him) the Captain said he didn't believe I had any money; he wanted money the bank would take; I said we can go to New London and get the money; he said no; I want to go to the bank at Wellington; what the Wellington bank will take I will take; I said it makes no difference; you can have the money in pennies, if you want to. I will go to Wellington tomorrow."

The witness Wheeler testifies that on said Sunday he overheard talk between plaintiff and the Captain; plaintiff started away and halloed back, "I will meet you at Wellington, and you can have pennies if you want to, and that Watt said all he wanted was the currency.

The defendant, Captain Watt, testifies to the conversation on Sunday as follows:

"Plaintiff said he had a draft there, slapping his breast pocket; I said I wanted the money and would take what the Wellington bank would take; he said he would get the money at New London and be back Monday; said I could have pennies if I wanted them; I said I would take anything that was legal tender."

It appears in evidence that on Monday plaintiff went to Wellington with his draft; went to both banks there; waited a reasonable time for defendants to tender them the money, and they never came. Captain Watt stayed at home most of Monday, waited for plaintiff, but he never came with the money.

Plaintiff has made no other tender of money than as above stated.

We take it that the law implies that, in a case like this, where no place for tender is agreed upon, it must be made to the defendant at his home or residence. Where the parties agree upon another place for tender, it must be made at the place agreed upon.

We find that no sufficient tender was ever made to defendants at their home or residence. Did they agree upon another place for tender? We are of the opinion that the evidence fails to show that their minds met upon that proposition. Doubtless plaintiff thought the tender was to be made at Wellington, and he so testifies; there is nothing in the evidence to show that defendants so understood and agreed. We think they understood that plaintiff was going to have his draft cashed either at New London or Wellington, and come back with the money to their home on Monday. The parties doubtless misunderstood each other; such being the case it was the plaintiff's duty to make a tender on the farm. He could have gone there when he returned

1914.]

Lorain County.

from Wellington, as defendant's farm adjoined plaintiff's. Why plaintiff never afterward made any tender to defendants at their home, he does not explain. If he was misled into going to Wellington on Monday by any statements of defendants, the law would have given him a reasonable time thereafter to make a tender at their home. This he has absolutely neglected and refused to do, although defendants testify that they were willing to receive the money.

For failure to prove a tender or any circumstances excusing one, the petition is dismissed.

**DATE FROM WHICH TIME RUNS FOR FILING A PETITION
IN ERROR.**

Circuit Court of Lorain County.

MRS. W. F. McLEAN V. CORNELIA JOHNSON ET AL.

Decided, May 8, 1905.

Error—Reversal of a Judgment Obtained in Justice Court and Retaining Case for Trial Not a Final Order.

Where a case is taken upon error from the court of a justice of the peace to the court of common pleas, the judgment of the justice reversed and the case retained for trial and at a later term dismissed for want of prosecution, the four months within which a petition in error may be filed in the circuit court dates from the dismissal of the case and not from the reversal of the judgment of the justice, as that was not a final order.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

July 23, 1903, plaintiff brought her action against the defendant before a justice of the peace, and in her bill of particulars claimed judgment for "the sum of \$42.20 amount due including the interest for medical services rendered and medicines furnished to defendant by the late Dr. W. F. McLean, and which account is now the property of plaintiff?"

The attorney for plaintiff verified said bill of particulars by his affidavit. Summons was issued returnable July 28th, 1903, and defendants duly served. On the latter date, as appears from the transcript of the justice, defendants failed to appear: plaintiff was present by her attorney and the justice made the following entry:

“No counter-claims or off-sets presented. By reason of the sworn affidavit of plaintiff's attorney attached to her bill of particulars, that said account is due and payable, it is considered and adjudged by me that said plaintiff recover from said defendants the sum of \$42.20, together with the costs of this case as of record herein taxed.”

August 28, 1903, said defendants filed their petition in error in the common pleas court, praying for the reversal of said judgment.

Plaintiff was granted leave to file an answer to said petition in error in which she set up certain facts with regard to the merits of the case, and as to what was done in the justice court, but of course the facts set forth in the transcript from the justice are the only facts which the common pleas court could consider, as no bill of exceptions was taken from the justice court.

March 7, 1904, the common pleas court reversed the judgment of the justice of the peace and retained the case for trial. To this judgment and order the defendant in error in said court took no exception.

December 15, 1904, no pleadings having been filed in common pleas court by either party, the action being duly called for trial, was dismissed for want of prosecution at the costs of said Mrs. W. F. McLean, for which judgment was rendered against her. No exception was taken to this judgment or order.

Thereafter on December 31, 1904, said Mrs. W. F. McLean filed her petition in error in this court, to reverse the judgment of the common pleas court.

Defendants in error objected to hearing this case on the ground that the petition in error was filed too late in this court.

That would be true were the four months within which a petition must be filed to date from the judgment of reversal, March

1914.]

Lorain County.

7, 1904. But that judgment was not a final order upon which proceedings in error could be predicated. *Kelly v. Hunter*, 12 O., 216; *Langworth v. Sturges*, 6 O. S., 143; *Railway Co. v. Barley*, 39 O. S., 170; *Bradley v. Walker*, 13 C. C., 530.

The reason for this rule is that the common pleas court having reversed the judgment of the justice of the peace, under Section 6733, Revised Statutes, was obliged to retain the case "for trial and final judgment, as in cases of appeal" so that the case was still pending in the common pleas court until such trial and final judgment.

The petition in error in this court is filed in time, if the four month's limitation is dated from the judgment of dismissal.

It appears that the common pleas court reversed the justice court because the latter rendered judgment upon a verified bill of particulars, without further proof, notwithstanding said bill of particulars failed to contain a full statement of the items constituting the cause of action, as provided in Section 6562, Revised Statutes, which reads:

"If either party shall set forth in his bill of particulars, counter-claims or set-off, a full statement of the items constituting his cause of action, or defense, and if the same shall be verified by the affidavit of the party, his agent or attorney, the party appearing having complied with the provisions of this section shall be entitled to a judgment, without further proof, in all cases where the opposing party fails to appear and set up his defense to such cause of action, counter-claim or set-off in accordance with the provisions of this section."

We are inclined to think that there was a technical violation of this statute by the justice and that the transcript shows it, but whether the common pleas court erred in reversing the justice court for that reason can not be reviewed in this court, for, as shown, it was not a final order, and no exception was taken to said judgment of reversal.

Upon said reversal the defendant in error below had a right to file a petition in the common pleas court and try out her case there; this she neglected to do for three terms, and thereupon the common pleas court dismissed the case for want of prosecution. That there was error in so doing does not appear

from the transcript of said court, and as no bill of exceptions was taken to said judgment, we are unable to say that it was erroneous. *Miller v. Simms*, 1 C. S. C. R., 485.

Judgment affirmed.

REPLEVIN OF SAW LOGS.

Circuit Court of Lorain County.

WILLIAM CASE V. GEORGE KORTZ.

Decided, May 8, 1905.

*Tender—When Tender or Excuse for Not Tendering Purchase Price.
a Question for the Jury.*

Where standing timber was sold at a certain price per M., the logs to be measured and paid for by check before being removed from the land; a partial payment made, and after the trees were cut but before they were measured or paid for the land was sold and the purchaser of the trees notified by the vendor of the land that the sale was made subject to his rights in the trees, and by the purchaser of the land that if he wanted the trees he must remove them within three days and pay for them in cash; in an action of replevin following the refusal of the purchaser of the land to allow the purchaser of the trees to come upon the land to measure them, the question for the jury is not as to the ownership of the trees but whether or not three days was a reasonable time in which to allow their removal and whether or not the act of the purchaser of the land excused the purchaser of the trees from making legal tender.

I. E. Hershey and L. Z. Tanney, for plaintiff.

H. G. Redington, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

Defendant in error brought his action before a justice of the peace to replevin from plaintiff in error four white oak saw logs.

The case being appealed to the common pleas court and petition therein filed, the defendant in that court filed his second amended answer in which he alleged the following facts:

1914.]

Lorain County.

“And for a second and further answer, this defendant says that on or about the —— day of November, A. D. 1901, he purchased of one Mary A. Stewart a certain lot of timber, among which is the timber described in plaintiff’s petition; that said timber was standing at the time of said purchase, and that the agreement and terms of sale of said timber from Mary A. Stewart to this defendant was as follows, to-wit: that said timber was to be cut and scaled by this defendant and paid for by check, before the same was removed from the premises of the said Mary A. Stewart; that he was to pay for the same at the rate of sixteen dollars (\$16) per thousand feet; that the same was to be scaled by this defendant and some lumberman from Cleveland.

“Defendant further says that at said time he paid to the said Mary A Stewart, the sum of five dollars (\$5) to apply on said contract; that thereafter, to-wit, on or about the —— day of May, A. D. 1902, he went upon said premises and cut said timber, especially the timber mentioned or described in plaintiff’s petition, that during the year of 1902, the season was such that it was impossible for him to remove said timber from said premises on account of the wet weather, or to do anything with the same.

“Defendant further says that as soon as the weather permitted, which was on or about the 23d of December, A. D. 1902, he went upon said premises and commenced to cut into logs and to scale timber among which was the timber described in plaintiff’s petition; that before he finished cutting and scaling all of said timber, the plaintiff in this action ordered him from said premises and drove him from the same, and refused to allow him to take possession of said timber and said that he was the owner thereof.”

Then follows an allegation of tender to a Mr. Carter, brother of Mary Stewart, alleged to be her agent, and also that the defendant was ready and willing to pay for the logs.

The reply filed to this amended answer has some admissions, and it is important to read them:

“The plaintiff George Kortz. for his reply to the second amended answer of the defendant filed in this case says, he does not deny that during the month of December, A. D. 1902, the said defendant entered upon the lands where the timber and logs described in plaintiff’s petition were located, and that said defendant then commenced to cut said oak trees into logs, and this plaintiff admits that he refused to allow said defendant to

finish cutting said trees or timber into logs and that he then ordered the said defendant to leave said premises, and the plaintiff was then the owner of said premises and told the defendant so, and the owner of all said timber and logs, and the plaintiff admits that he then refused to give defendant possession of said timber and logs.

"The plaintiff further denies each and every other statement and averment in said second amended answer contained except such statements and averments as are admissions of the statements and averments contained in plaintiff's petition filed therein."

Upon these pleadings the case was tried to a jury, and upon the trial the following written communications were introduced in evidence:

"N. ROYALTON, O., November 8, 1902.

"WM. CASE,

"West View, Ohio.

"*Dear Sir:* About one year ago you bought of Mrs. Mary Stewart some timber, to be immediately cut, scaled and paid for by check. You cut some and it lays on the ground where it fell, unscaled and unpaid. Unless she hears from you in a substantial way within ten days she will proceed to sell the timber to other parties. This is to so notify you.

"Respectfully yours,

"A. B. KNOX,

"*Justice of the Peace.*

"N. ROYALTON, O., Dec. 4, 1902.

"WM. CASE,

West View, Ohio.

"*Dear Sir:* Mr. Carter refuses to accept your check which I enclose herewith and return to you. The place was sold last night to Mr. Kortz, as soon as Mr. Carter reached home, subject to whatever claims you may have on the trees you bought of Mrs. Stewart, and hereafter you will have to do business with Mr. Kortz and pay him for the timber.

"Respectfully,

"A. B. KNOX.

"PARMA, OHIO, December 17th, 1902.

"WM. CASE,

"*Dear Sir:* I have bought Mrs. Stewart's place in Strongville. If you want them oak trees you must come and see me inside

1914.]

Lorain County.

of three days or else they will be cut up into logs. If you want them you must bring the money, or check for them seven trees cut down if scaled satisfactory.

“GEORGE KORTZ.”

We think the evidence clearly shows that Carter acted as agent for Mrs. Stewart, at least up to the time Knox wrote his second letter, and that Knox was duly authorized by both Mrs. Stewart and her brother, Mr. Carter, to send both of said letters.

The court held that Carter's agency for Mrs. Stewart ceased on or before December 4th, 1902, and that Knox's letter of that date was sufficient notice thereof to Case, and in so holding we think there was no error.

From the admissions in the pleadings and from the evidence it further appears that neither Mrs. Stewart or Knox ever tendered back to Case the five dollars which he paid her when the agreement regarding the trees was first made, and that Case never tendered to Mrs. Stewart or to Kortz, or to any person representing either of them the amount of money which he agreed to pay for the logs.

Notwithstanding Case's delays in carrying out the agreement for the purchase of the logs, it is apparent that the contract with him was never rescinded, because his five dollars was never returned to him. The option of the vendor, Mrs. Stewart, under such circumstances, to resell on notice, or to retain title, holding the vendee for any deficit, we also think was never exercised.

Mrs. Stewart sold the land upon which the logs were lying to Kortz, but she did not sell him the logs and credit Case with the consideration for them on his contract. The letter of December 4, 1902 says:

“The place was sold last night to Mr. Kortz *subject to whatever claim you may have on the trees you bought of Mrs. Stewart.*”

In legal effect said agreement was an assignment of her contract to Kortz so that he took Mrs. Stewart's place and assumed and agreed to carry out the contract with Case. Such being the case, we think that Case was relieved from making tender to Mrs.

Stewart after December 4th, 1902, but as the evidence in the case clearly shows that the purchase price of the logs was to be paid as soon as the logs were cut and scaled, it is manifest that Case was not entitled to possession of the logs until he paid Kortz or tendered to Kortz; whether such tender was excused by Kortz driving Case off the land, when he went there to scale the timber, depends upon the reasonableness of his notice of December 17, in which he said, "If you want them oak trees you must come and see me inside of three days or else they will be cut into logs." Kortz had a right to set a reasonable time within which Case should scale and pay for the logs, and if Case did not act, to dispose of the trees as he saw fit, crediting their value on what was realized for them on Case's contract. The reasonableness of the time set, together with the reasonableness of the time within which Case acted, if the three days were not reasonable, should have been left to the jury under proper instructions.

This was not clearly done, and the question of tender was not touched upon by the court, notwithstanding defendant made a request as follows:

"On general principle, whenever an act of one party, to whom another is bound to tender money, services or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from technical performance of his agreement. The law never requires a vain thing to be done."

The troublesomeness with the charge is, that it deals entirely with the question of *ownership* of the logs, rather than with the right of *possession* thereof.

Granting that title to the logs passed to the vendee when the trees were severed from the land, confessedly the vendor was to retain possession of them until the vendee paid or offered to pay for them.

The only questions of fact which were in dispute and for the jury to determine were, whether Case had paid for the logs, tendered payment or been excused from making tender. If none of these facts were established, Case was not entitled to the pos-

1914.]

Cuyahoga County.

session of the logs, and had no right to take them away. If they were established, the plaintiff must fail in his case.

The jury should have been restricted in its inquiry to these simple propositions. That it was not, was largely the fault of counsel for plaintiff in error, whose theory of the case seems to depend upon the question of title, and whose requests to charge, while in the main correct as elementary or abstract principles of law, had little reference to the real issues in the case, and no pertinent application to the facts as conceded or shown in the evidence.

We find no prejudicial error in rulings on evidence and hold that defendant's objections based upon the fact that plaintiff in replevin filed no new affidavit in the common pleas court, are not well taken; but for error in the charge in the respect mentioned, the judgment is reversed.

ERROR NOT CURED BY REMITTITUR.

Circuit Court of Cuyahoga County.

NEW YORK, CHICAGO & ST. LOUIS RAILWAY COMPANY V. CLEVELAND, PAINESVILLE & EASTERN RAILROAD COMPANY.

Decided, January 16, 1905.

Damages—When Remittitur Does Not Cure Error.

Where plaintiff has recovered a verdict in an action brought for two distinct injuries, for one of which defendant was not liable in damages, and the evidence as to the extent of the other injury was conflicting; a remittitur even though it be for a greater amount than that claimed for the injury for which defendant was not liable, will not cure the error in allowing that branch of the case to be considered by the jury, where it does not affirmatively appear that the remittitur was allowed for that reason.

John H. Clarke, for plaintiff in error.

Ford, Snyder & Henry, contra.

MARVIN, J. (orally); WINCH, J., and HALE, J., concur.

The Cleveland, Painesville & Eastern Railroad Company brought suit against the plaintiff in error, the New York, Chicago & St. Louis Railway Company, to recover for property destroyed in an accident whereby some cars of the plaintiff in error (some loaded cars upon a switch) ran against a trestle and injured the powerhouse and other property of the Cleveland, Painesville & Eastern Railroad Company. This occurred on the 31st of October, 1901. There was some coal on the cars which was consigned to the defendant in error. It was to be free on board cars at their powerhouse. It never reached their powerhouse. There is no dispute but that the loss on account of this coal was \$150. The court allowed evidence as to the value of this coal and charged the jury that they might find for the value of the coal as well as for the other injuries to the property of the Cleveland, Painesville & Eastern Company.

It is contended on the part of the defendant below that this coal never was the property of the Painesville Company; was never delivered to it. The evidence shows that they had never paid for it. It clearly was not yet delivered to the Painesville Company; it was not the property of the Painesville Company, and recovery for that should not have been allowed to the Painesville Company.

As to the extent of the injury to the property of the Painesville Company (the powerhouse) the testimony is conflicting. It is placed by some of the witnesses at an amount very much more than the recovery and by some at considerable less, but, as has been said, the court instructed the jury that they might allow for the value of the coal. The recovery was for \$1,008.88. On motion for a new trial, the court determined that the verdict must be set aside unless the plaintiff below should remit \$308.88, which was done and judgment entered for \$700.

It is urged that as the amount remitted was much more than the value of the coal, the judgment as entered should be permitted to stand. That would be true if we could mathematically determine that the court had included in the remittitur the \$150. If we knew that was included, we would then affirm the judgment because the evidence is uncertain as to the extent

1914.]

Cuyahoga County.

of the injury to the powerhouse and might justify a verdict as to the amount entered as a judgment. For aught we know, the court may have concluded that the injury amounted to only \$550. The result is that we are not prepared to say that the judgment as entered was right, and unless the defendant in error shall still remit the \$150, the value of the coal, we shall have to reverse the judgment. If that amount is remitted, the judgment will be affirmed. We think probably the court may have included that in the remittitur, but if so, we do not know it.

**LIABILITY OF STOCKHOLDERS FOR DEBTS INCURRED
BY THE CORPORATION.**

Circuit Court of Cuyahoga County.

WILLIAM SCOFIELD V. THE EXCELSIOR OIL COMPANY ET AL.*

Decided, January 16, 1905.

Pleading and Practice—Stockholders Liability—Appeal Brings Questions on Pleadings to the Appellate Court—Subsequent Facts May be Set Forth in Supplemental Petition—Stockholders Liable for Debts Incurred Before Transfer or Assignment of Stock.

1. An appeal brings up questions on the pleadings, in the same manner as such questions would be raised had the appellate court had original jurisdiction.
2. Facts necessary to make a cause of action, which have occurred since the filing of an original petition, may be set forth in a supplemental petition.
3. Under Section 3258, Revised Statutes, stockholders are liable for such debts as the corporation has incurred before the transfer of the stock and such liability is not limited to such debts as have matured at that time.

Henderson & Quail, for plaintiff.

Goulder, Holding & Masten, contra.

MARVIN, J.; WINCH, J., concurs.

*Affirmed without opinion, *Cobb v. Scofield et al*, 74 Ohio State, 513.

This case comes to this court by appeal from the judgment of the court of the common pleas.

The questions to be determined relate to whether the defendant, Lester A. Cobb, is liable in any sum to the plaintiff.

Scofield originally brought his suit claiming to be a creditor of the Excelsior Oil Company, which is a corporation, setting out an indebtedness of the corporation to him; that the corporation was without assets and was insolvent; that the defendant Cobb was a stockholder in the corporation at the time the indebtedness was created; that he transferred his stock to Charles E. French, who thereafter transferred the same to J. B. Huston. Said French is insolvent, and said Huston died insolvent in 1894. The prayer was for a recovery against Cobb for a proportionate share of such indebtedness determined by the amount of stock held by him when the indebtedness was created.

Upon a trial had in this court it was held upon the evidence that the corporation was indebted to plaintiff in the sum of \$149,016.67, with interest from the 9th day of January, 1900, and such holding was made upon the evidence of original indebtedness and transfers of claims made to him.

Upon proceedings in error in the Supreme Court, it was there held that the allegations of the petition were not sufficient to entitle the plaintiff to relief against the stockholders, in that no allegation was made that a recovery had been obtained against the company; that upon execution being issued no property was found out of which the same could be satisfied, and the case was remanded to the court of common pleas, where it originated, for further proceedings.

Thereafter said plaintiff brought suit in the Court of Common Pleas of Cuyahoga County against said oil company for said indebtedness. Appearance of the company was entered by its attorneys, and upon hearing, the plaintiff recovered judgment against the company for the sum of \$98,497.20, together with costs, said judgment bearing interest from the 22d day of September, 1902.

On leave granted, plaintiff, after obtaining such judgment, filed a supplemental petition in this action, setting up the re-

1914.]

Cuyahoga County.

covery of this judgment; that execution had been issued thereon; that no property of the company was found whereon to levy; and that no part of said judgment has been paid.

Motion was made in the court of common pleas and renewed here, to strike this supplemental petition from the files. This motion was overruled at the time of the hearing, the court reserving the final determination of what should be done therewith until after the case had been heard. Such hearing has been had, and it becomes our duty now to determine whether such motion should have been sustained by this court.

On the part of the plaintiff it is urged that this question is not properly here; that the question was one of discretion with the court of common pleas and its determination with the said court must be final unless such discretion was abused. In support of this reliance is had upon Section 5225, Revised Statutes, which provides that, when a case is appealed from the court of common pleas to the circuit court, the trial shall be conducted in the latter court "in the same manner as in the common pleas court and upon the same pleadings, unless amendments are ordered or permitted by the circuit court."

This proposition of the plaintiff is not sound. The construction sought to be given to this section is against repeated holdings of the courts. It has been held many times by this court that an appeal brings up questions upon the pleadings, in the same manner as such questions would be raised had this court had original jurisdiction of the case. To hold otherwise would be to hold that, if a demurrer to a petition or answer has been filed but not sustained, but which clearly ought to have been sustained, still, upon an appeal the court could not pass upon that question of pleading. We hold otherwise. It has been repeatedly said that the appeal brings up the demurrer and all questions raised on demurrer. We hold, therefore, that the motion to strike off this pleading is properly here.

In support of this motion it is urged, that since the Supreme Court has held that the facts as they existed at the time the suit was brought were not such as to entitle the plaintiff to recover at all, that he can not, by the creation of subsequent facts, be

permitted to bring such facts into his original action and proceed thereon. We think this contention is not sound.

The supplemental petition in this case only added to the allegations of the original petition that judgment had been recovered by plaintiff against the company on the indebtedness set out in the original petition, and failure to obtain any property upon execution with which to satisfy said judgment. It made no claim for an indebtedness not claimed in the original petition, nor did it make any new allegation as to the actual insolvency of the company, but only set out the facts occurring after the bringing of the suit, which the law requires in a proceeding of this kind as evidence of such insolvency before suit can be maintained against the stockholders.

In the case of *Gibbon, Admr., v. Dougherty et al.* 10 O. S. 365, it is held that where in aid of execution on a judgment the judgment creditor brings an action to subject to the satisfaction of his judgment the debt of a debtor of the judgment debtor, and such debtor of the judgment debtor is served in the action, the fact that after such service the judgment upon which the action is brought is set aside at a subsequent term for irregularity and a new judgment is entered, may be set up in a supplemental petition and proceed with the action.

In the opinion, on pages 371 and 372, this language is used by the court:

“The subject-matter of the suit and the parties in the action, as well as the object of the suit, all continued to be before the court. The substantial object was the payment of the debt of the judgment debtor; and the reversal of that judgment for an irregularity was in no sense an intimation of its payment, or a relinquishment of the claim of the plaintiff to enforce its payment in the manner and by the means expressed in the petition. The law, which never requires a vain thing, would not, therefore, require the plaintiff, after having the irregularity in the same judgment cured by a new judgment expressing the same debt, incur the delay and expense of dismissing the suit and commencing *de novo* when the entire proceeding could be perfected by a supplemental petition. And our practice, as regulated by the code, shows still less favor to objections merely technical. A supplemental petition was always regarded as only ancillary to the original petition. Its office is to bring before the court some

1914.]

Cuyahoga County.

event which has happened subsequently to the commencement of the suit. The plaintiff does not thereby withdraw any allegation in his original petition not inconsistent with the averments in the supplemental petition. If, therefore, the plaintiff had even neglected to make, as he has done in this case, special reference in his supplemental petition to his original petition, he would still have been entitled to the full benefit of the same."

1 Nash Pleading & Practice, page 288, and following, discusses this question and cites authorities, and quotations in brief of counsel for plaintiff are made from them, and we think the holding as enunciated here is in full accord with these authorities.

We therefore overrule the motion to strike the supplemental petition from the files.

A great amount of evidence was introduced on the question of whether the company was indebted to the plaintiff. The transactions of the parties from the beginning of their business relations up to the time of the bringing of the suit was gone into. From this evidence we find that the oil company was, at a time when Cobb was a stockholder, indebted to the plaintiff; that the subsequent holders of the stock which had formerly been owned by Cobb were insolvent; that all of the solvent stockholders, other than Cobb, have paid their proportionate share of such indebtedness and that the liability of Cobb must depend upon whether the plaintiff is still a creditor of the corporation. A judgment has been obtained, as hereinbefore stated, by the plaintiff against the corporation, for \$98,497.20, together with costs, and drawing interest from September 22, 1902. Except by contributions of stockholders, nothing has been paid upon this judgment. The judgment is still in full force and, as we hold, establishes the fact of the indebtedness to the amount of such judgment. Without going into a discussion of the facts as to any indebtedness other than such as is shown by this judgment, we only say that viewing such evidence as we now view it, and considering the fact that plaintiff brought suit for only the amount recovered, we find that the amount of the indebtedness of the company to the plaintiff is fixed by said judgment.

If it is said that this is not consistent with the finding of this court in the former case, the only answer we have to make is that the court as now constituted would not find upon the facts as we found before.

It was suggested in argument that the defendant Cobb was not liable to respond in this action because of the wording of Section 3258, Revised Statutes, as amended April 29, 1902. The section as amended reads:

"The stockholders of a corporation who are the holders of its shares at a time when its debts and liabilities are enforceable against them, shall be deemed and held liable, equally and ratably * * * and no stockholder, who shall transfer his stock in good faith, and such transfer is made on the books of the company, or on the back of the certificate of stock, properly witnessed or tendered for transfer on the books of the company prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof."

Before the amendment the section read:

"The stockholders of a corporation which may be hereafter formed and such stockholders as are now liable under former statutes, shall be deemed and held liable," etc.

Under the statute before the amendment the holding of the Supreme Court was that the liability of the stockholder attaches at the time the debt is created, and is not discharged by the subsequent transfer of the stock. *Brown v. Hitchcock*, 36 O. S., 687.

In the case *Judge White* in the opinion discusses at considerable length the nature of the stockholders' liability, quoting at considerable length from the decisions of other courts with approval, where it is held that the liability is in the nature of a contract made by the stockholder when he becomes such. Among such quotations is the following from *Corning v. McCullough*, 1 Comstock, 47-54:

"It is virtually and in effect a liability upon a contract and the mutual agreement of the parties."

Also from *Yager v. Cleveland*, 36 Mo., 476:

"It is a debt under the statute, due from the stockholder to the creditor, springing out of and co-existent with the contract between the corporation and the creditor. It is clear that no act of the stockholder without the consent of the creditor, can exonerate him from the liability thus named."

In *Hawthorne v. Calif*, 69 U. S., 10, it is said in the syllabus:

"A statute repealing a former statute, which made the stock of the stockholders in a chartered company liable to the corporation's debts, is, as respects creditors of the corporation, existing at the time of the repeal, a law impairing the obligation of contracts, and void."

If, then, the amended section is construed to mean that the stockholder is liable only for such debts as have matured and upon which suits could be at once brought before the stock was transferred, it would be void as obnoxious to Section 16, Article VIII of the Constitution of the state, which reads:

"No * * * law impairing the validity of contracts shall ever be made."

We think, however, it was not the intention of the Legislature by this amendment to restrict the liability of the stockholders to those debts which were due and collectible before the stock was assigned, but only to such as are incurred while the stock is held by such stockholder, and are enforceable when they become due, against the corporation; hence the liability of defendant Cobb is in no wise affected by this amendment of the statute.

We reach the conclusion, therefore, that the plaintiff is entitled to the rights of a creditor to the amount of his judgment; that Cobb is liable to him as a stockholder to the amount of his pro rata share of the stock held at the time the debt was contracted. This is forty-two seventeen-hundredths of the entire judgment. Decree will be entered accordingly.

This is an opinion of the majority of the court only. Judge Hale does not concur.

HEARING DENIED TO A DISMISSED SCHOOL JANITOR.

Court of Appeals for Hamilton County.

STATE, EX REL JOHN L. BLOOM, v. BOARD OF
EDUCATION OF CINCINNATI.

Decided, May 10, 1914.

Mandamus—School Janitor Fails to Appear When Cited by the Board to Answer to Charges—Estopped Thereby from Being Granted Relief in Court.

Mandamus does not lie upon the petition of a school janitor-engineer to require the board of education to prefer charges against him and give him an opportunity to be heard, where specific charges were theretofore preferred against him and a date set for the hearing which he ignored, whereupon he was notified that his services would be no longer required.

J. B. Derbes and E. Scott King, for plaintiff in error.
Alfred Bettman, City Solicitor, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

Error to common pleas court.

Relator was a janitor-engineer of Woodward High School and as such received from the board of education of Cincinnati the sum of \$6,999 per year out of which sum he was required to pay for his help and to furnish certain material, netting said relator an average of \$100 per month.

By a letter from the chief engineer, June 17, 1911, he was notified that his services would not be required by the board of education after June 24, 1911. He demanded to know the charges against him and that he be given a hearing. On July 3, 1911, the board of education passed the following resolution:

“Be it Resolved, That there exists a cause relating to the suitability and capacity of John L. Bloom to perform his duties as engineer-janitor of Woodward High School which is sufficient to justify his removal in this, to-wit: that the said John L. Bloom has violated the rules governing the janitor service of the Cincinnati public schools in that—

1914.]

Hamilton County.

"First, he has been insolent to teachers, the principal and to his superiors; and

"Second, he has used intoxicating liquor while on duty; and

"Third, he has been inefficient in his care of the said building.

"Be it Further Resolved, That the clerk is hereby directed to send a copy of this resolution to the said John L. Bloom and another copy thereof to the civil service commissioners.

"Be it Further Resolved. That the said John L. Bloom be given a reasonable opportunity to be heard in his own behalf upon the said charges."

A copy of this resolution was sent to the relator and another copy to the civil service commission of the city of Cincinnati. Said commission fixed July 17, 1911, for hearing said matter and so notified the relator.

Instead of presenting himself for such hearing before the civil service commission at that date or attending the meeting of the board of education and demanding a hearing by it, the relator brought this proceeding below wherein he sought by mandamus to require the board of education to prefer charges against him and give him an opportunity to be heard before said board and after said hearing to determine the said charges and if sustained to certify same to the civil service commission.

The writ of mandamus was properly denied. The resolution of the board of education as passed preferred specific charges and offered him reasonable opportunity to be heard in his own behalf and the record fails to show that he availed himself of such opportunity. It seems unnecessary for him to seek by mandamus to obtain that which he had already been afforded. It appears from the record in this case that his position with the board of education was not that of an employee coming within the terms of the General Code but was in the nature of a contract relation. *Lehigh Coal & Nav. Co. v. Railway*, 29 N. J. Eq., 252; *Rogers v. Railway*, 31 S. C., 220.

Judgment affirmed.

REFUSAL TO ENJOIN ERECTION OF A DRY CLEANING PLANT.

Circuit Court of Cuyahoga County.

ADA ADAMS AND EMMA A. BRITTON V. HENRY MUELLAIRE AND
PROSPER IRVING

Decided, January, 1905.

Nuisances—A Dry Cleaning Plant Not Necessarily a Nuisance.

A plant to be used for dry cleaning and dyeing garments may be so constructed that it will not be *per se* a nuisance to adjoining property owners, and where the evidence shows that a plant constructed in that manner is contemplated, its erection will not be enjoined.

Jas. A. Ford and Cushing & Clark, for plaintiffs.

C. J. Neal and J. C. Hutchins, contra.

MARVIN, J.; HALE, J., and WINCH, J., concur.

The plaintiff, Ada Adams, is the owner of a parcel of real estate in the city of Cleveland, Cuyahoga county, Ohio, bounded westerly by Hayward street, having a frontage of 102 feet 4½ inches on said street and a depth of about 107 feet.

The plaintiff, Emma A. Britton, owns a parcel of land immediately south of said Adams property and having a frontage on Hayward street of 55 feet and a depth the same as that of the property of the plaintiff, Adams.

On the property owned by these plaintiffs there is a block of six dwelling-houses, the two most southerly of said houses being the property of, and upon the lands of said Britton, and the four more northerly of said houses being the property of, and upon the lands of said plaintiff, Adams. These are good and substantial brick houses except that the Hayward street front is of stone and the wall of the most southerly of these houses is of stone and is next to Sibley street.

The defendants, who are partners doing business under the firm name of H. Muellaire & Co., have recently purchased a parcel of land bounded on the south by Sibley street and on the west by the east line of the premises of the plaintiff.

1914.]

Cuyahoga County.

The defendants carry on what is known as a dry cleaning and dyeing establishment, and propose and intend to erect buildings upon their said land and furnish said buildings with machinery and appliances for the carrying on of said business extensively.

In the conduct of said business the defendants use and will use upon their said premises gasoline in large quantities. They intend to carry on a business which will require the keeping upon said premises of several hundred gallons of gasoline all the time.

At the time this action was brought it was the intention of the defendants to erect and construct their said buildings and appurtenances and place therein and use machinery and devices, upon plans which the evidence shows would be attended with danger from explosions and fire in such wise as to greatly endanger the property of the plaintiffs and as would also cause offensive odors from such gasoline to pass from said premises to the houses of the plaintiffs to such an extent as to greatly discommode the occupants of such houses.

The relief sought by the plaintiffs is an injunction restraining the defendants from storing upon their said premises "gasoline or any similar volatile and inflammable product or petroleum and from using any such substance upon said premises; from allowing odors therefrom to escape or from other substance giving forth into the surrounding air offensive odors; from conducting the business of dry cleaning upon said premises; from conducting the business of dyeing upon said premises; and from erecting upon said premises any building designed for the purpose of conducting therein the business of dry cleaning or the business of dyeing."

The evidence shows the business contemplated by the defendants consists largely in the cleaning and dyeing of wearing apparel and other similar goods; that in such cleaning large quantities of gasoline are used; that the gasoline as used produces vapor in large quantities, which vapor under certain conditions is very inflammable and is explosive and that it produces offensive odors.

If it were the purpose of the defendants to construct their buildings and appurtenances and conduct the business under the plans which they intended to follow at the time this action was begun, we should have no hesitation in granting an injunction against such construction and carrying on of the business; but the evidence clearly shows that the defendants now propose to erect buildings with devices and appliances materially different from those intended at the time of the bringing of the suit. Plans have been submitted to us and we have had the testimony of experts, which lead us to the conclusion that the business of dry cleaning and dyeing, to the extent that these defendants propose to carry the same on and for which they propose to erect their buildings and supply their appliances, may be so conducted as to practically relieve the neighborhood from offensive smells emanating from the business and so as to reduce the dangers from fire and explosions so completely as that the business would not be such as to constitute a nuisance which could be enjoined by the court.

The evidence further shows that the defendants have employed an educated chemist and practical man under whose directions they are to put in their machinery and appliances.

We can not say, as the evidence now stands before us, that the construction of the buildings and the furnishing of the appliances and the carrying on of the business as is now proposed by the defendants will result in annoyance by smells or endanger by fires or explosions so as to constitute a nuisance, and that being so, we must deny the injunction prayed for.

It does not follow from this that when the buildings of the defendants are constructed and their appliances introduced that they may not turn out to be such as that the court should enjoin their use for the purpose intended, nor does it follow that the plaintiffs may not be entitled to an injunction from the carrying on of the business as the defendants may undertake to carry it on. We hold, only, that the evidence before us does not satisfy us that what the defendants contemplate doing will constitute a nuisance entitling the plaintiffs now to an injunction.

1914.]

Cuyahoga County.

Finding however, as we do, that when this suit was begun the defendants did contemplate the construction of buildings and appliances which would have been dangerous and offensive in their operation, the costs of this proceeding should be assessed against the defendants. The judgment, therefore, is that the petition of the plaintiffs is dismissed at the costs of the defendants.

**INSOLVENCY OF CORPORATION PROVED BY TAKING A
DEFAULT JUDGMENT.**

Circuit Court of Cuyahoga County.

WM. C. SCOFIELD V. THE EXCELSIOR OIL COMPANY ET AL.*

Decided, January 25, 1905.

Judgments—Failure to Notify Stockholders of an Insolvent Corporation of the Institution of a Suit Against it Does Not Amount to Fraud and Collusion.

Where in an action to enforce stockholders' liability a judgment for the plaintiff has been reversed and the case remanded from the Supreme Court for the sole reason that no insolvency of the corporation had been shown, and while pending in the common pleas court, the plaintiff obtains a default judgment against the corporation upon which execution is issued for the purpose of establishing the insolvency of the corporation in the stockholders' liability suit, such judgment is not obtained by fraud or collusion and is not in violation of any rights of the stockholders, even though they were not notified of the suit.

Henderson & Quail, for plaintiff.

Goulder, Holding & Masten, contra.

MARVIN, J.; HALE, J., and WINCH, J., concur.

The defendant, Lester A. Cobb, has filed his motion for a new trial in this case, which has been argued to us with earnestness and ability by his counsel and in such wise as to show that

*Affirmed without opinion, *Cobb v. Scofield et al.* 74 Ohio State, 513.

counsel feel great confidence in the position that the judgment of the court is wrong. The matters urged in support of the motion, though not all touched upon in the opinion, were all carefully considered by the court before the judgment was announced and the members of the court who concurred in that judgment are still of the opinion that the judgment is right.

The point upon which the court has found the greatest difficulty and because of which one member of the court does not concur in the judgment is upon the question of whether the judgment obtained by the plaintiff against the oil company in another action, during the pendency of this suit, is conclusive upon the defendant Cobb. That judgment was obtained without any service being obtained upon Cobb and without his having notice of the suit. If that judgment was obtained by the fraud of the plaintiff or by collusion between him and the oil company or those representing the oil company, it is not conclusive as against Cobb.

The averments of the answer of Cobb to the supplemental petition in reference to the obtaining of such judgment are in part as follows:

"Plaintiff as the owner of all the stock of said company and defendant, George F. Scofield, purposely and intentionally refrained and omitted to file any answer or make any defense in said cause, and caused and permitted a default judgment to be taken in said action in the sum of \$98,497.21 in furtherance of the collusion and fraud aforesaid; that neither this defendant or his attorneys were given notice of the bringing of said action, and they had no knowledge thereof or of the judgment in said case until after the filing of the amended and supplemental petition herein in February, 1903, when the term of court at which said judgment was rendered had terminated; that said notice was withheld from them in furtherance of said collusion and fraud, the plaintiff well knowing that he had brought said action and secured said judgment for the intent and purpose of further prosecuting this action against this defendant. Defendant further says that the Excelsior Oil Company had a good and sufficient defense to said action, and that it was not indebted to plaintiff in any amount whatever, all of which plaintiff and George F. Scofield well knew, but that plaintiff and George F. Scofield colluded together to obtain, and did obtain judgment

1914.]

Cuyahoga County.

aforesaid fraudulently, by withholding and refusing to make any defense."

The admission of the plaintiff in reply to this answer is as follows: He admits

"that plaintiff purposely refrained from making any answer or making any defense to said action and caused a default judgment to be taken therein in the amount stated by said defendant; that said action was commenced and said judgment secured partly for the purpose of further prosecuting this action against the said defendant Cobb; but as to all the averments of the said fifth defense not herein admitted, and which are not admissions of the averments of plaintiff's said amended and supplemental petition, plaintiff says that he denies them and each of them."

It was urged upon the original hearing and upon the hearing of this motion that this admission upon the part of the plaintiff was an admission of collusion between himself and the Excelsior Oil Company, or between himself and George F. Scofield acting for said oil company. Such is not the legal effect of the admission. It is admitted that he took a default judgment; that he purposely refrained from making any answer, or making any defense in said action. It is a denial of any collusion between himself and anybody else to secure this judgment.

We come then to the question, do the facts justify us in holding that this judgment was obtained either by fraud or collusion?

Collusion is defined in the A. & E. Ency. of Law (2d Ed.), Vol. 6, page 212, as follows:

"Collusion is where two persons, apparently in a hostile position and having conflicting interests, by arrangement do some act in order to injure a third person or deceive a court."

In *Cary v. Houston, etc., R. Co.*, 52 Fed. Rep., 675, it is defined as "an agreement between two or more persons unlawfully to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law."

"Collusion" is defined by Webster as follows:

"In law, a deceitful arrangement or compact between two or more persons, for the one party to bring an action against the

other for some evil purpose, as to defraud a third party of his right; a secret understanding between two parties, who plead or proceed fraudulently against each other, to the prejudice of a third person."

Bouvier's Law Dictionary defines collusion as follows:

"Collusion, fraud. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law."

The facts here are that the plaintiff had obtained the judgment of the court of common pleas and the judgment of this court that the plaintiff was a creditor of the oil company to an amount greatly in excess of the amount prayed for in the action in which it is claimed there was this collusion and fraud. The Supreme Court had reversed those judgments, giving no intimation by such reversal as to there being any error in holding that the plaintiff was a creditor of the oil company to the amount which had been found by the lower courts, but holding that until the insolvency of the oil company was established by a judgment against it and the issuance and return of an execution unsatisfied, the present action could not be maintained.

For the purpose of establishing such insolvency in the way pointed out by the Supreme Court, the action in which collusion is charged was brought. We think that the charge that the bringing of such action without any notice being served upon the defendant Cobb should not be characterized as a fraud, and that the fact that the oil company made no defense should not be characterized as collusion. It was not sought in that action to recover for an amount greater than two courts had already found that the oil company was indebted to the plaintiff, and though it might have been well for the plaintiff to have given notice to the defendant Cobb, we do not see that the failure to do so constituted a fraud upon him. The plaintiff manifestly expected to obtain no right against Cobb which he did not already have, except to have the proper evidence that the oil company was insolvent.

Entertaining these views, the motion for a new trial is overruled.

1914.]

Hamilton County.

SCHOOL BUILDING JANITORS UNDER CIVIL SERVICE.

Court of Appeals for Hamilton County.

STATE OF OHIO, ON THE RELATION OF ARCHIE BARTHOLOMEW, v.
RICHARD B. WITT, AS TREASURER OF THE CITY
SCHOOL DISTRICT OF CINCINNATI.

Decided, September 26, 1914.

Civil Service—Janitor of a Public School Building is in the Classified Service—Hold Over Janitors Subject to a Non-Competitive Examination—Liability of Treasurer of School District Under Section 486-21.

1. Under the rules of the board of education of Cincinnati a janitor of a public school building is an employee of the board rather than an independent contractor.
2. Such janitor of a public school building is within the classified service, but those who were legal incumbents of the position at the time of the passage of the civil service act are entitled to hold over, subject to a non-competitive examination.
3. Where the money has been drawn by the treasurer of a school district for payment of any salary due one legally employed as janitor and there is no sufficient reason for his not paying it over, a writ of mandamus will issue to require such payment.

E. M. Ballard, for plaintiff.

Walter M. Schoenle, City Solicitor, and *Charles A. Groom*, Assistant Solicitor, contra.

JONES, O. B., J.; JONES, E. H., J., concurs; SWING, P. J., dissents.

The board of education of Cincinnati has provided certain rules for janitors and engineers, under which a janitor, janitor-engineer, or janitress shall be appointed in each school building and graded according to the character of heating plants and closet systems, and shall be at all times subject to the direction of the mechanical engineer or his representative and under the immediate supervision of the principal of the school. Under this arrangement the janitor has general supervision of and re-

sponsibility for the school building, yard, machinery and equipment committed to his charge. It is his duty to employ and pay out of the compensation allowed him all necessary assistants and provide all necessary supplies in the way of buckets, soap, brooms, etc., that may be required by him in cleaning and caring for said property. A compensation, which is also termed "salary" in the code of rules prepared by the board, is fixed on a per diem basis, determining the entire compensation for the care of each building, yard and apparatus on a schedule which provides for a computation by the square feet of floor space and yard surface and the character of heating, the number of boilers used, the number of stoves, pumps, shafting, engines, dynamos, electric motors, etc., the entire compensation being determined by this schedule. The rules provide for dividing the amount of such compensation treated as a yearly salary, by 313 for the per diem compensation, and for the payment thereof on the regular salary days of the board, for the number of days included in the period elapsing from the previous salary day.

The relator in this case has been a janitor of Woodward high school since the 26th day of June, 1911, and claims in the petition herein that the relations existing between him and the school board in rendering such service as janitor were those of a contractor with the board, rather than the relations of an employee. Under the rules of the board of education he was entitled to receive \$8,238.82 per year for the care and custody of said building and apparatus, out of which he was required to pay the necessary help and to purchase the necessary supplies for cleaning said property and keeping the same in order in accordance with said rules. Relator alleges the performance of all of his duties and requirements under said conditions and payment for same up to August 3, 1914, and that an order has been made by the board of education for the payment to him of the sum of \$631.20 for services in said capacity between August 3, 1914, and August 29, 1914; that pursuant to the action of the board of education ordering such payment the clerk of said board drew a check or voucher on the depository in which the funds of said school district are deposited, against the proper fund, which

1914.]

Hamilton County.

voucher or check was signed by the necessary officers, and that the defendant in this case, who is the treasurer of the city school district of Cincinnati, drew from said depository the sum in cash necessary to pay the compensation due to relator in accordance with said action of the board; that he now holds said sum of \$631.20 for such purpose, but refuses to pay it over to relator, who prays that a writ of mandamus issue commanding said treasurer to pay to him said sum.

The answer of the treasurer alleges that the relator is within the civil service of the school district of Cincinnati and within the classified service thereof. He denies that relator stands in a contract relation with the board of education, and alleges that the relator was appointed as a janitor and was paid a salary in accordance with the payroll transmitted by the board of education to the defendant for payment. He denies that said board of education had any authority under the law to enter into a contract as claimed by relator because of the statute providing for the employment of janitors by appointment, and alleges that said position of janitor is within the classified service of said school district. His answer fails to allege any reason why the defendant should not pay over the money which he has drawn from the depository for payment to relator.

From the argument of the case, however, it would appear that defendant has declined to make this payment by reason of the provisions of Section 486-21, General Code (Section 21 of the act, 103 O. L., 710).

The first question to be considered is the nature of the relations between relator and the board of education, whether as janitor, under the rules and regulations of the board he is an employee of the board, or whether he is an independent contractor.

In the broad sense of the term, every employee, sustains a certain contract relation with his employer. A careful examination of the laws relating to the board of education fails to show lack of authority on its part to make and carry out the rules and regulations provided for the care and maintenance of its buildings. Broad powers are given to the board under Sec-

tion 7620, G. C., to "make all other provisions necessary for the convenience and prosperity of the school." The usual limitations as to public letting of contracts by bids seem to be required as to such board only as to matters falling within the terms of Section 7623, G. C., with reference to buildings and repairs, *Gosline B'd of Ed. v. Toledo*, 11 C.C.(N.S.), 195. Section 7690, G. C., authorizes the board to appoint janitors and fix their salaries. This, no doubt, may be done either in the customary way of appointing each person serving in such capacity and fixing a monthly or yearly salary for his particular service or in the manner which has been provided by the plan adopted by the Cincinnati board. Whether or not such a plan is contrary to public policy is addressed rather to the General Assembly than to the court, and, finding as we have said, no inhibition against such an arrangement in the law, we arrive at the conclusion that the method of employing janitors adopted by the Cincinnati board is legal.

Under the law as we view it, it is possible that the board of education might provide for this service by an independent contract, or by direct employment. Considering however the terms expressed in the rules and regulations, the manner of employment of relator, the fact that no written contract was prepared and signed between the parties, and that his relations with the board are subject to termination at any time, we must conclude that his position is rather that of an employee than an independent contractor.

The case of *State, ex rel Bloom, v. Cin. Bd. of Ed.*, 20 C.C. (N.S.), p. —, has been relied upon as holding that a janitor under such a regulation was in no sense an employee. The language used in the opinion in that case might be so construed. but was not intended to have that effect nor was such ruling necessary for the purposes of that case.

The next question to determine is whether or not the relator comes within the provisions of the civil service law as found in 103 O. L., 698. The general terms embraced in this law convince the court that such a position as is occupied by the relator is intended to fall within the class of service covered by Section

1914.]

Hamilton County.

8 (b) as found on page 702 (G. C., 486-8), and should be included within the classified service subject to the rules provided by said act. Had an exemption been intended for this class of service it should be found among the paragraphs under Section 8 (a). The evident purpose of the act found in 103 O. L., 698, was to bring all classes of public service in the state, city and school district within its provisions, subject only to the exceptions therein contained. The position held by relator not being named among those exceptions he must be held to be a public employee within the classified service as defined in Section 8 (b) of said act. But as a legal incumbent of the position at the time of the passage of the act he would be entitled to hold it subject to a non-competitive examination as provided in Section 10 of the act.

The real question, however, raised by the pleadings is whether the treasurer is justified in refusing to pay over to the relator the amount of money drawn by the treasurer from the depository for the benefit of the relator. As above stated, defendant's counsel relies upon Section 486-21 of the General Code as a defense. A careful examination of this section shows that it is intended to prevent the drawing of a warrant on the treasurer, for the payment of salary or compensation to any person in the classified service unless the estimate, payroll or account for such salary or compensation should have the certificate of the State Civil Service Commission, or in case of service in the city, the certificate of the municipal civil service commission. It will be noticed while the first part of this section in relation to the drawing of a warrant includes the fiscal officer of a city school district the provision in regard to a certificate by the civil service commissioner relates to the service of a city and fails to include specifically the service of a city school district. The last part of this section makes liable for the repayment of money improperly paid both the officer making an appointment in contravention of the provisions of law and the officer signing, countersigning or authorizing any warrant for the payment of same. It will be noticed that the defendant in this case would not be included in the liability fixed by this statute. There is nothing in

the pleadings of record of this case as to whether or not the payroll estimate or voucher upon which this money was drawn bore the certificate of the city civil service commission, but as the court has found that the relator was regularly and legally employed, it was the duty of the civil service commission to so certify his payroll or voucher. The money has actually been drawn and is in defendant's hands for the benefit of relator. No legal reason is shown by him for not paying it over.

A writ of mandamus will therefore issue as prayed.

**APPLICATION OF THE STATUTE SHORTENING THE TIME FOR
BRINGING PROCEEDINGS IN ERROR.**

Court of Appeals for Hamilton County.

EMMA E. HARDING v. C., C., C. & ST. L. RAILWAY CO.

Decided, June 3, 1914.

Error—Statute Limiting the Time for Bringing Proceedings to Seventy Days—Applies to Cases in Which Judgment Has Been Rendered Since the Law Went Into Effect—Section 12270.

A proceeding in error is an independent action, and jurisdiction in such a proceeding is not acquired under the present statute, in a case in which it is sought to reverse a judgment rendered since the law went into effect, unless commenced within seventy days after the entering of such judgment.

Geo. W. Harding, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, contra.

SWING, J.; JONES, E. H., J., and JONES, O. B., J., concur.

This is an action from the court of common pleas, brought in this court on the 4th of March, 1914. It was heard in this court on motion to strike the petition from the files for the reason that it was not brought within the time limited by the statute for the filing of petitions in error. Trial was had in the court of common pleas on the 21st day of October, 1913. A verdict was ren-

1914.]

Hamilton County.

dered for defendant on October 23, 1913, and judgment entered on the verdict November 17, 1913.

On May 9, 1913, the Legislature amended Section 12270 of the General Code so as to read as follows:

"No proceeding to reverse, vacate or modify a judgment or final order shall be commenced unless within seventy days after the entry of the judgment or final order complained of; or in case the person entitled to such proceedings is an infant, a person of unsound mind, or imprisoned, within seventy days exclusive of the time of such disability."

The section before it was amended provided four months as the time within which such action might be brought. The question presented to us therefore is whether the old or the amended section applies.

The present law applies by the force of the words of the statute, unless Section 26 of the general provision of the statutes exempts it from the operation of the amended law. This section reads as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment is related to the remedy it shall not affect pending actions, prosecutions or proceedings unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution or proceedings existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing action."

The law of May 9, 1913, by force of law went into effect ninety days from that time, August 8, 1913. The action of Harding against the railway company was pending at the time of the passage of the act, and of course was pending in the court of common pleas at the time the law went into effect. Whether or not this act is saved by this general provision of the code must be determined.

The action pending in this court was pending in the court of common pleas when the act of May 9, 1913, went into effect.

The Supreme Court in the case of *Charles v. Fawley*, 71 O. S., 50, at page 54 in the opinion of the court, speaking of proceedings in error, said:

“Such proceedings recognize the termination of the original case. To institute them it is required that a petition in error be filed in the reviewing court, and to acquire jurisdiction of the person of the adverse party there must be the issuance and service of summons; whereas, the steps necessary to effect an appeal are taken in the court having jurisdiction in the original action and the adversary party is bound thereby without summons. An obvious analogy is found in the doctrine of *lis pendens* where the distinction between appeals and proceedings in error, in this respect, is recognized. The property which is the subject of a suit is bound by its event not only while the case is pending in the court of first resort, but also while it is pending in a court to which it may be taken by appeal; but where a review of a judgment is sought by proceedings in error, the suit is regarded as ended by the judgment of the court of first resort. This distinction was recognized in *Heirs of Ludlow v. Kidd's Exrs.*, 3 Ohio, 541, where Sherman, J., speaks of an appeal as a proceeding in the original cause, and concludes that its effect is to continue the cause and suspend the decree of the inferior tribunal until the judgment of the tribunal to which the appeal is taken.”

We have carefully gone over the cases cited by counsel in argument, as well as others that we have found, in the Supreme Court and Circuit Courts, especially the case in *Hays v. Olen tangy Park*, 1 C.C.(N.S.), 101, and the case in 1 N.P.(N.S.), 195, and have arrived at the conclusion that the proceeding in error is an independent action, and that the statute limiting the time in which such proceeding may be brought, to seventy days, applies in a case where a judgment was rendered after that law went into effect and which judgment is sought to be reversed in a proceeding in error, which is the case here, this action in this court having been brought 107 days after the rendition of the judgment in the court below. The judgment of the court of common pleas was rendered after the law of 1913 went into effect, and it must apply.

We think the motion was well taken, and the petition is therefore stricken from the docket.

RULING ON DEMURRER HELD NOT PREJUDICIAL.

Circuit Court of Cuyahoga County.

W. J. HOLDEN V. ROSE M. DAVEY ET AL.

Decided, March 6, 1905.

Pleading and Practice—Sustaining Demurrer to Second Cause of Action When a Repetition of First Cause Not Prejudicial Error.

Where a petition has set out two causes of action, but the second is only a repetition of the first with the addition of other facts which would not in themselves constitute a cause of action, sustaining a demurrer to the second cause is not prejudicial error, the demurrer to the first cause of action being overruled.

MARVIN, J.; HALE, J., and WINCH, J., concur.

The error complained of here is that the court sustained a demurrer to the second cause of action set out in the petition.

Two causes of action were set out in the petition. Demurrer was filed to each of said causes. The court overruled, and properly overruled the demurrer to the first.

The second cause of action begins with the words:

“For his second cause of action plaintiff says that he incorporates therein all the allegations set out in his first cause of action the same as if therein rewritten.” Then follows allegations which do not in themselves constitute a cause of action.

It is urged, however, that since by virtue of Section 5083, Revised Statutes, the first cause of action is to be treated as though rewritten in the second, and since it is held that the first cause of action is good as against demurrer, it necessarily follows that the second cause of action was also good against a demurrer, without reference to what follows, the allegations making the first cause a part of the second. Logically and technically this is correct, but since by overruling the demurrer to the first cause, the court had left the petition with that cause still to be answered, there was no prejudice to the plaintiff in the rulings as to the second. Since only facts stated in the petition which

constitute a cause of action against the defendant were left in full force by the ruling on the demurrer, the plaintiff was not prejudiced by such a ruling as confined such facts to one cause of action, wherefore the judgment is affirmed.

AN UNREASONABLE BUILDING RESTRICTION.

Circuit Court of Cuyahoga County.

STATE OF OHIO, ON RELATION OF FREDERICK F. BOOK AND GEORGE H. BOOK, v. CITY OF CLEVELAND AND J. F. DOOLEY, AS INSPECTOR OF BUILDINGS OF SAID CITY.

Decided, March 6, 1905.

Police Power—Provision of Building Code Prohibiting Erection of Certain Buildings Within Sixteen Feet of Lot Line, Unreasonable and Void.

The section of a building code enacted by a municipal council, which prohibits the erection of any building for the working of wood or other combustible materials within sixteen feet of any lot line is an unreasonable exercise of the police power and is void.

Frank E. Dellenbaugh and Philip E. Hintz, for relators.
N. D. Baker, contra.

MARVIN, J. (orally); WINCH, J., and HENRY, J., concur.

This is a proceeding in mandamus.

A demurrer is filed to the petition and it is submitted upon that demurrer.

The defendant the city of Cleveland is a municipal corporation of the state of Ohio. The defendant Dooley is inspector of buildings for said city. A duty of the inspector is to issue certificates for permits to erect buildings in the city whenever persons applying therefor have legal right to erect such buildings.

The relators made a proper application to the defendant Dooley for permission to erect a building. That certificate of

1914.]

Cuyahoga County.

permission was refused. An appeal was taken to a proper board of the city which sustained the ruling of the building inspector, and the building inspector still refused to issue any certificate.

The building which relators propose to erect on the land owned by them is to be one story, twelve feet high, ninety-three feet long and twenty-nine feet wide. It is to be constructed of brick, substantially fire proof. The outer walls will be about one foot from the lot lines of the relators. The building is to be used, if erected, as a carpenter shop, heated with gas, and all the machinery is to be operated by a gas engine. From this description of the building it clearly would not be in itself a nuisance, unless there be some lawful authority which has declared that such building shall be a nuisance.

The relators would be entitled to the certificate for which they have applied but for the provisions of an ordinance of the city which is in these words:

“No building * * * or shop for the working of wood or other combustible materials * * * shall be erected within thirty (30) feet of any building of the first grade, or ‘hotel,’ ‘tenement,’ or ‘dwelling,’ or ‘office’ except the dwelling owned by owner of the building to be erected for or converted to the uses aforesaid.

“No building shall be erected for or converted to the uses aforesaid within sixteen (16) feet of any lot line or any other grade of building not provided for above, except that when such buildings are located in a block between street lines, where all buildings located thereon contain stores, warehouses, shops or factories devoted to the same or similar uses as herein prescribed, then such buildings, if provided with dead brick walls along their inner lot lines, may be spaced near each other, and if such stores, warehouses, workshops or factories are built up to such lot lines and separated only by dead division or party walls, there shall be an open alley not less than sixteen feet wide in the rear thereof, if such width is not in conflict with any other provision of this code.”

This ordinance was passed under authority of Section 1536-100, Revised Statutes, which provides:

“Every city and village shall be a body politic and corporate, which shall have perpetual succession, may use a common seal,

sue and be sued, and acquire property by purchase, gift, devise, or appropriation for any municipal purpose herein authorized, and hold, manage and control the same and make any and all rules and regulations, by ordinance or resolution, that may be required to carry out fully all the provisions of any conveyance, deed or will, in relation to any gift or bequest. All municipal corporations shall have the following general powers and council may provide by ordinance or resolution for the exercise and enforcement of the same."

Paragraph 13 reads:

"To regulate the erection of buildings and the sanitary condition thereof, fences, bill boards, signs, and other structures within the corporate limits;" etc.

The authority given by this statute comes clearly within the police power which municipalities may exercise. (See Dillon, Munc. Corp., Section 141.)

There are, however, limits to this power. It can not be exercised in a manner wholly unreasonable. In speaking of this, Judge Dillon, Section 379, says:

"Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive * * * in which case the contemplated action may be prevented by appropriate suit or proceedings."

This brings us, then, to the consideration of the reasonableness of the ordinance under authority of which the defendants refuse the certificate asked for by the relators.

As to what is unreasonable, we have examined various authorities, and special attention is called to the case of *Crawford v. City of Topeka*, 20 L. R. A., 692, where it is held that an ordinance providing that "No person shall erect a bill-board or other structure for advertising purposes unless the same is placed at such distance from the line of the street or sidewalk as shall exceed at least five feet the height of such bill-board structure," to be unreasonable and therefore void. In the opinion, this language is used:

1914.]

Cuyahoga County.

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health or comfort of the public; but a limitation without reason or necessity can not be enforced."

It is believed that properly states the law, and we come to consider whether the ordinance complained of here comes within the description or definition of what is unreasonable. The language used is: "No building shall be erected or converted to the uses aforesaid, that is for the erection or use of shops to be used for the working of wood within sixteen feet of any lot line." The phrase "any lot line," is susceptible of two interpretations, one of which is so manifestly unreasonable that it can hardly be supposed that that definition was intended to mean the lot lines as fixed by the platting of lots. It clearly would be unreasonable to say that a man who owns four or five lots platted in any part of the city that he might not erect a building that would cover the lot lines if he kept away from his own boundary lines for a proper distance, and still be very close to or upon the lot lines as fixed by the plat in which his land is situated. That is so manifestly unreasonable that it can not be supposed that that was intended, but if that is not intended, then it clearly must mean the boundary lines of the land of the party who proposes to erect a building. That boundary may be a street line; it may be the line of an alley; it may be on the line of the river; it may be on the line of the lake; it may be opposite to some public grounds of the city, still, with that construction of the language used in the ordinance, one would be prohibited from building within sixteen feet of his boundary line. And so, if he owned a lot bounding on the river he would be kept back sixteen feet from the river lest he should communicate fire from his building; he would be kept back sixteen feet from the street lest he communicate fire. It is contemplated that if there is an alley sixteen feet wide at the rear one may build upon the lot: so it is certain, it seems clear, that the council in passing the ordinance overlooked the fact that lot lines, meaning boundary lines of one's property, might be, as already stated, on the street, river, lake or opposite to public grounds and still restrict and

keep him back sixteen feet from his line. An effort was made in the examination of this ordinance to see if a construction could be given the language by which side lines would be meant, but the matter of sides lines was not overlooked in the passage of this ordinance and was provided for later on, so that we must construe this to mean, not lot lines as platted, but boundary lines of the party who proposes to erect a building. It would seem to us so clearly unreasonable to say that one owning property bounded by a street, river, lake or public ground must be restricted in the erection of a building to sixteen feet from that line, that we must declare the ordinance, in so far as it provides that the building shall not be within sixteen feet of a lot line, unreasonable and void.

The demurrer to the petition is overruled.

COMPETENCY OF ADMISSIONS AS TO PHYSICAL CONDITION.

Circuit Court of Cuyahoga County.

HIRAM D. JONES v. STATE OF OHIO.

Decided, March 28, 1905.

Criminal Evidence—Admissions of Accused when Voluntary, are Admissible.

Where in the course of an examination being made by physicians, appointed by a court for that purpose, the accused makes admissions as to his physical condition, such admissions are admissible in evidence, even though the court had no right to order such examination and the physicians had not right to make it and the accused did not know that he was not obliged to submit to such examination.

Hart, Canfield & Croke, for plaintiff in error.

H. R. Keeler, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This is a proceeding in error. Jones was tried in the court of common pleas for a felony and convicted; the only error for which it is claimed the judgment should be reversed was, that

1914.]

Cuyahoga County.

over the objection of the plaintiff in error evidence was admitted which was incompetent and was prejudicial to him.

It is shown by the record that while Jones was in prison awaiting a preliminary examination before the police court of the city of Cleveland, the judge of said court called two physicians, Dr. W. M. Jones and Dr. Maurice Budwig, to his court room and directed or requested them to make a physical examination of the accused to ascertain whether he was afflicted with a contagious disease. From the testimony of one of the physicians, Dr. Budwig, it appears that the prisoner was present in the court room when this direction was given to the physicians and the prisoner went to prison with the two physicians. Dr. Jones says nothing about having seen him in the court room, but says that he told him that he and Dr. Budwig were to examine him by order of the court. The physicians then proceeded to make the examination, having the prisoner remove his clothing.

At the trial in the court of common pleas, both of these physicians were called by the state as witnesses. Each was asked as to the result of the examination, but their testimony on this point was rejected by the court. Each was also asked as to what, if anything, the prisoner said as to his condition of health, and each gave a conversation then held by them with the prisoner, in which things are stated to have been said by the prisoner which though in no wise constituting any confession of guilt on his part, yet constitute the admission of certain facts which tend to show his connection with the crime charged against him. This testimony was admitted over the objection of the defendant, and exception to its admission was duly taken.

If these admissions were voluntarily made by the prisoner, there can be no question as to the admissibility of the testimony. If they were made under such circumstances as to show compulsion, or the promise of clemency for making them, or the threat of punishment for not making them, such promise being given, or such threat being made by one having authority to make such threat, or by one having such apparent authority, and whom the accused believed had the authority, they ought not to be received.

It is provided by Section 10 of Article I of our State Constitution that no person shall "be compelled in any criminal case to be a witness against himself." And this has been held to protect a prisoner from any forcible examination of his person for the purpose of securing evidence against him. It has also been uniformly held, as hereinbefore stated, that confessions of guilt made under threats or promises of those in authority, can not be used against one on trial for crime, and though the text books and cases call attention to the difference between the confessions of guilt and admission of independent facts tending to show guilt, the rule as to their admission as evidence seems to be the same, except that in some, if not all, of those jurisdictions where it is required of the state to show affirmatively that confessions were voluntarily made, before they can be admitted in evidence, this affirmative evidence is not required as to such admissions.

However, in Ohio, the rule is that whatever one confesses or admits as to his connection with a criminal act, is presumed to have been voluntarily made and will be admitted in evidence against him, unless it be shown on his part that the same was involuntary.

The only ground on which the admissions in this case can be claimed to have been involuntary is, that they were made to physicians who were directed or requested by the judge of the police court to make an examination of his person, and which order the prisoner probably supposed the judge had the right to make, whereby the physician had some authority over him, and that they were made at the time of and in connection with such examination. Of course the judge had no right to make the order and ought not to have made it. The physicians had no more right, after receiving the order or direction of the judge, to make any examination of this prisoner than they had to make such examination of any other citizen, but it does not follow that what was said by the prisoner was not voluntarily said. No one said to him that he must answer questions; it would appear from the evidence that he did not hesitate about answering, and it is altogether probable that it did not occur to him that he was making any admission of any incriminating nature.

1914.]

Cuyahoga County.

- Under what circumstances the confessions of one accused of crime will be held to be voluntary has been considered in *Fouts v. State*, 8 O. S., 98; *Leuth v. State*, 5 C. C., 94; *Spears v. State*, 2 O. S., 583, and in other cases.

We have examined also many other authorities, including *People v. Glover*, 71 Mich., 303, and *State v. —*, 71 Iowa, 11. Judgment affirmed.

**DEFENSE OF DISMISSAL OF REPLEVIN SUIT AS A RESULT
OF SETTLEMENT.**

Circuit Court of Cuyahoga County.

STEPHEN PRASCHL V. CHRIST C. McMAHON AND THE CLEVELAND
METAL STAMPING COMPANY.

Decided, March 27, 1905.

*Parol Evidence is Admissible to Show that the Dismissal of a Suit
Was the Result of an Agreement.*

Where the plaintiff in an action of replevin has executed the delivery bond required by statute, received the property replevined, dismissed the replevin suit at its costs, and is later sued by the defendant in the replevin suit for the value of the property, an answer alleging that the dismissal of the replevin suit was the result of a settlement states a good defense, and parol evidence is admissible to show the agreement upon which the suit was dismissed and the disposal of the property.

L. A. Grossner and H. Preusser, for plaintiff in error.

N. Marks Flick, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur

Suit in replevin was brought by the metal stamping company against Prashl and one Meigs before a justice of the peace. Writ was issued to one McMahon, who was a constable, and some 20,000 small metallic ticket boxes were taken by him from Prashl under the writ, and statutory bond being given by the company, these goods were delivered to it.

Later this suit was dismissed at the costs of the company, but the boxes were retained by the company. The present suit was brought by Praschl to recover for the value of the boxes.

The defense set up by the stamping company was that the dismissal of the suit before the justice of the peace was made under an agreement by the company with the defendants in that action, by the terms of which the plaintiff here was to have delivered to him certain tools; that the company should pay the costs of the action and retain said boxes and sell the same upon the best terms it could, retaining out of the avails of the same some \$800 due it from said Meigs, and pay over to him the balance. The metal stamping company paid the costs, delivered the tools to Praschl, and is converting the boxes into money for the purpose of carrying out said agreement, as it is claimed.

In his reply the plaintiff denies the making of the agreement under which the case before the justice of the peace was dismissed. With the pleadings in this situation the case went to trial.

It is urged that there was error on the part of the court in admitting evidence of the agreement under which the replevin case was dismissed. We think there was no error in admitting this evidence. The only entry on the docket of the justice of the peace is "Dismissed without prejudice at plaintiff's costs." If this dismissal was made under some contract as to what should be done with the goods taken in replevin, that fact is admissible.

The plaintiff proved by the constable that the goods were taken from him (the plaintiff) by the officer under this writ of replevin and were turned over to the metal company upon such company giving the bond required by law. The bond was not produced in the case, but it is to be presumed to have been such as is required by Section 6616, Revised Statutes, and must therefore have provided that plaintiff would prosecute the action to final judgment, and that if the judgment was against the plaintiff the property should be returned, etc., or pay the appraised value thereof.

The entry of the justice of the peace of a dismissal of the case without prejudice would, unexplained, entitle the defendants in

1914.]

Cuyahoga County.

replevin to a return of the property, but we think it clear that, if the dismissal was made upon an agreement such as set out in the answer of the metal stamping company, it would be entitled to have the agreement carried out. This view was taken by the court below.

The only evidence tending to show any agreement for dismissing the replevin case was the testimony of the plaintiff, and falls far short of establishing any agreement. It appears from the evidence, which is exceedingly unsatisfactory, for the plaintiff was unable to speak English clearly, that this plaintiff and Meigs at one time had a joint interest in these boxes; that Meigs gave the plaintiff an order for them. Plaintiff says that they became his; that they were taken from him in the replevin suit.

So far as appears, there was no agreement about settling that suit. The boxes, then, should have been returned to the plaintiff. They were not returned.

At the close of plaintiff's evidence motion was made by the defendant that the jury be directed to return a verdict for defendant. This was overruled but the court then, of its own motion, ordered the case dismissed without prejudice, unless plaintiff make Meigs a party. Meigs was not made a party, and so the dismissal without prejudice was made. We think this was error on the part of the court. Taking the evidence as plaintiff gave it, Meigs was not a necessary party to the suit.

The judgment is reversed and the case remanded to the court of common pleas.

**APPLICATION OF FUNDS UNDER THE WORKMEN'S
COMPENSATION LAW NOT SUBJECT
TO INJUNCTION.**

Court of Appeals for Hamilton County.

WASHINGTON T. PORTER ET AL, TRUSTEES OF THE PUBLIC LIBRARY,
v. WM. A. HOPKINS, TREASURER OF HAMILTON COUNTY, ET
AL; AND BOARD OF EDUCATION OF CINCINNATI v. SAME; AND
STATE, EX REL THOMAS L. POGUE, PROSECUTING ATTORNEY, v.
SAME; AND CITY OF CINCINNATI, BY WALTER M. SCHOENLE,
CITY SOLICITOR, v. SAME.*

Decided, October 24, 1914.

*Jurisdiction—Not Conferred Upon the Courts—To Enjoin Payments
Under the Workmen's Compensation Law.*

The authority conferred by Sections 2921 and 4311 on the prosecuting attorney of the county and the city solicitor to bring actions for the purpose of restraining the illegal payment of money from the public treasury do not give jurisdiction to a court to entertain an injunction proceeding contrary to the provisions of Section 58 of the workmen's compensation act.

W. T. Porter, Walter M. Schoenle, City Solicitor; Chas. A. Groom, Assistant City Solicitor; Thomas L. Pogue, Prosecuting Attorney; J. V. Campbell, Carl M. Jacobs and Simon Ross, Jr., Assistant Prosecuting Attorneys, for plaintiffs.

Timothy S. Hogan, Attorney-General; John A. Deasy, Jas. I. Boulger, Thomas H. Morrow, Assistants to the Attorney-General, contra.

PER CURIAM.

These actions come into this court on appeal from the court of common pleas. They are brought on behalf of the city of Cincinnati, county of Hamilton, the board of education of the city school district of the city of Cincinnati and the trustees

*Affirmed by the Supreme Court, December 15, 1914—Porter et al, Trustees, v. Hopkins, Treasurer, reported in 90 Ohio State.

1914.]

Hamilton County.

of the public library for the purpose of having Sections 15, 16, and 17 of the act known as the workmen's compensation act, 103 O. L., pages 72 to 92, inclusive, declared unconstitutional, and to enjoin the treasurer of Hamilton county from paying a warrant issued by the auditor of Hamilton county in favor of the Treasurer of the State of Ohio, to pay the fund provided for in said Sections 16 and 17.

Objection is made by defendants to the jurisdiction of this court to entertain these injunction proceedings, by reason of Section 58 of said act, which is as follows:

"No injunction shall issue suspending or restraining any order, classification or rate adopted by the board, or any action of the Auditor of State, Treasurer of State, Attorney-General, or the auditor or treasurer of any county, required to be taken by them or any of them by any of the provisions of this act; but nothing herein shall affect any right or defense in any action brought by the board or the state in pursuance of authority contained in this act."

Plaintiffs rely, however, upon the right of the prosecuting attorney of the county by virtue of Section 2921, General Code, and the solicitor of the city by virtue of Section 4311, General Code, to bring such actions for the purpose of restraining the misapplication of funds and the illegal payment of money from the treasury.

While these sections relied upon are both broad in their terms and would ordinarily confer the authority to bring such actions by the prosecuting attorney and the city solicitor, Section 58 of the act in question is so specific that it must be held to control. And as it does not take away the right of the courts to entertain other actions to determine the question of constitutionality sought to be raised herein, by its terms, this court has no jurisdiction to entertain these cases, and is without authority to grant the relief prayed therein.

The actions, therefore, will be dismissed.

**PASSENGER KILLED BY THE BACKING OF THE CAR FROM
WHICH HE HAD ALIGHTED.**

Circuit Court of Cuyahoga County.

ELSIE L. CLEVERDON, ADMINISTRATRIX DE BONIS NON, WITH WILL
ANNEXED, v. THE LAKE SHORE ELECTRIC RAILWAY
COMPANY ET AL.*

Decided, June 5, 1905.

*Negligence—Carriers—Question of Negligence of Carrier in Inviting
Passenger to Alight, and of Passenger in Alighting at a Dangerous
Place is for the Jury.*

Where the evidence discloses that a passenger upon an electric car had notified the conductor of his desire to alight at a certain stop; that the car ran past that stop and came to a stand-still upon a trestle; that the passenger who was upon the rear platform, thereupon alighted from the car and started to walk back along the trestle to the station, but before he could do so was killed by the car backing upon him without warning; *Held*: That the question of the negligence of the carrier and of the contributory negligence of the passenger were for the jury to determine.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

On the 23d day of August, 1902, H. L. Cleverdon, plaintiff's intestate, boarded car No. 17 on the road of defendants. Said car was bound eastward, and said Cleverdon paid his fare to a point known as Cahoon road, which is stop No. 24 on said road, and notified the conductor that he desired to get off at that point. He was a frequent passenger on this line and often got off at this stop.

He was an engineer by occupation and was engaged largely in the construction of bridges, and at this time was superintending the construction of a bridge for the county not far from said stop No. 24. He was about 33 years old, and was a strong, active man in excellent health.

*Affirmed without opinion, *Lake Shore Electric Railway Co. v. Cleverdon*, Admr., 75 Ohio State, 618.

1914.]

Cuyahoga County.

Just east of stop No. 24, the tracks of defendant's railroad are supported on a wooden trestle over a ravine for a distance of several hundred feet and at a considerable elevation. This trestle is nine feet wide. At the time mentioned the conductor of the car gave the proper signal to stop the car at stop 24, but for some reason it did not stop there but ran on a considerable distance until it was upon the trestle. The witnesses vary as to how far the car was upon the trestle, but it was probably not less than sixty feet from the west end of the trestle when the car stopped, at a point where the elevation of the trestle was in the neighborhood of forty feet above the earth. Cleverdon had stepped out upon the rear platform of the car ready to alight at stop 24, but as the car went by he did not get off until the car stopped, when he immediately stepped off, swinging around so as to step upon the trestle back of the car, and started to walk back toward the stop at which he had intended to alight. The car at once backed toward him. The conductor, seeing his peril, gave the signal to stop and called to Cleverdon, warning him of his danger, but too late to save him, and he was precipitated to the ground beneath, sustaining such injuries that he died therefrom the next day at St. John's hospital in Cleveland, to which he had been removed.

The plaintiff, having been appointed administratrix of his estate, brought this suit to recover damages against the railroad company and its receivers for wrongfully causing his death.

The deceased was the engineer under whose direction and superintendence the trestle was constructed, and was entirely familiar with it and its surroundings.

At the close of the plaintiff's evidence the court, on motion of the defendant, directed the jury to return a verdict for the defendant, which was accordingly done and judgment entered upon such verdict. To this action of the court the plaintiff excepted. By proper proceedings the case is here for review. A bill of exceptions is filed containing all the evidence. The only error complained of is the action of the court in directing a verdict for the defendant.

It has been urged on behalf of plaintiff that there should have been submitted to the jury the question of whether the action of those in charge of the car in stopping on the trestle was an invitation to the passenger to alight, or at least whether he did not have a right to understand it to be such invitation. It is shown by the evidence that the custom in the operation of the car was not to back. Decedent was a frequent passenger. He was a strong young man, entirely familiar with the trestle and its surroundings. The car stopped for some purpose. Did it stop with the intent to run back? The conductor did not signal it to do so. Did it start back instantly by its own recoil at the very moment of stopping, or did it, as testified to by Kuepfer, stand twenty or thirty seconds and then start back? Was it negligence, if the passenger understood that the stop was to let him alight, and the car stood twenty or thirty seconds, to get off and walk away from the car?

All of these questions should have been submitted to the jury for its determination.

It could not be said as a matter of law, either that the company was not negligent in what it did, or that Cleverdon was negligent in what he did.

For error in taking the case from the jury and directing a verdict for the defendant, the judgment is reversed.

1914.]

Hamilton County.

**RESPONSIBILITY FOR COLLISION AT A STREET
CROSSING.**

Court of Appeals for Hamilton County.

THE CINCINNATI TRACTION COMPANY V. CHARLES DANNENFELSER.

Decided, May 29, 1914.

*Negligence—Wagon Struck by Car at Street Crossing—Court Divides in
Its Application of the Rule in the Steubenville Case.*

The charge of the court to a jury must be considered as a whole. The fact that a charge to the jury contains language which taken alone is subject to criticism, does not require a reversal of the judgment, when the charge considered as a whole was a fair and proper one.

Paxton, Warrington & Seasongood and Robert S. Marx, for plaintiff in error.

Overbeck, Kattenhorn & Park and Jos. W. Conroy, contra.

JONES, O. B., J.; JONES, E. H., J., concurs; SWING, P. J., dissents.

The action below was one to recover for personal injuries suffered by plaintiff and the expenses of medical attendance, and for injuries to plaintiff's horse and wagon and its contents, caused by an electric car operated by the defendant company running westwardly on Chapel street which struck plaintiff's loaded express wagon in which he was driving northwardly on Ashland avenue across Chapel street.

Plaintiff alleged that said car was operated in a careless and negligent manner in that it was running at an unlawful and excessive rate of speed, that the gong was not sounded, and that the motorman had ample time and opportunity after observing plaintiff's horse and wagon to stop said car and prevent said collision, but failed to do so. And plaintiff pleaded his own inability by reason of defendant's negligence to avoid its consequences, and alleged that he had exercised due care and was without negligence on his part.

The answer was a general denial and a plea that plaintiff was injured by reason of his negligence and without negligence

of the defendant, and that plaintiff was guilty of contributory negligence, which were denied by the reply.

The trial below resulted in a verdict in favor of plaintiff on which judgment was entered, and these proceedings were instituted in which defendant below seeks to reverse the judgment below and to have a judgment entered here for it, or if that can not be done, for a new trial.

The record discloses that Chapel street extends westwardly from Woodburn avenue, descending at a considerable grade for some 1200 or 1500 feet, being nearly straight, until it reaches Ashland avenue, where there is a considerable bend towards the south, and the street is nearly level, and after leaving Ashland avenue toward the west it has another bend and ascends a grade. Ashland avenue is the first street west of Woodburn avenue extending across Chapel street.

The motorman of the car which struck the plaintiff had turned off the power and was coasting down this grade running at a speed which he admits was not less than eight or ten miles per hour and which some other witnesses testified was much faster. The defendant was proceeding north on Ashland avenue about to cross Chapel street. There was a high tight board fence or billboard along the east line of Ashland avenue and the south line of Chapel street at the corner.

Plaintiff claims to have looked out for the car, but testified that he heard no gong or warning, and claims he did not see the car until it was too late to avoid the collision because of its speed.

The motorman testified that he saw the horse about to cross the track when his car was seventy-five feet from the crossing, but not anticipating that the driver would attempt to cross he made no effort to stop the car until he was within fifteen feet of the horse which was then on or across the track, and that he struck the wagon about the front wheel. It appears that the wagon was pushed at least ten feet beyond the west side of Ashland avenue, which was fifty feet wide, before the car was stopped. The motorman was indefinite in his testimony as to within what distance he could stop this car which was the usual open summer car type, but says that he stopped it on this occasion within a distance of about thirty feet.

1914.]

Hamilton County.

The record shows the usual conflict among the witnesses in their testimony as to the speed and signals and distances.

The rules of law as to crossing a street railway track in such a case as this have been clearly laid down by our Supreme Court in the recent case of *Steubenville & Wheeling Traction Co. v. Brandon*, 87 O. S., 187, in which the excellent opinion written by Judge Spear gives a full discussion. We deem it sufficient to refer to that case and the principles there laid down, and do not regard it necessary to discuss the numerous cases collected and referred to in the briefs of counsel on both sides.

This case is clearly a proper one for submission to a jury, and a careful reading of the record convinces us that its finding in favor of the plaintiff as to the negligence of the defendant is sustained by the evidence and should not be disturbed.

Numerous criticisms are made in the brief and oral argument by counsel for plaintiff in error, of the general charge of the court, quoting short paragraphs from it, particularly in defining "the burden of proof" and also "the proximate cause." While the language quoted in the brief of plaintiff in error might be subject to criticism when taken alone, the whole charge must be read together and when so considered the charge of the court appears to be a fair and proper one. The court fails to find any error which might be regarded as prejudicial either in the general charge or in the giving or refusal to give the special charges.

Complaint is also made as to the amount of the damages. When we consider that plaintiff suffered a fractured pelvis and that his personal injuries were serious and of a somewhat permanent character, and that he suffered also property damages to his horse and wagon, we do not believe that the amount of the judgment is excessive.

A careful examination of the record fails to disclose any error which may be deemed prejudicial to the defendant, and the judgment is therefore affirmed.

SWING, J., dissenting.

I think the evidence clearly shows contributory negligence on the part of defendant in error and therefore dissent from the judgment of affirmance.

AMENDMENT OF PETITION AFTER VERDICT.

Circuit Court of Cuyahoga County.

THE STOWE-FULLER COMPANY v. LOUIS J. DOMINICK.*

Decided, October 27, 1905.

Error Lies to Action of the Court in Overruling Motion for Judgment Notwithstanding Verdict Though Case is Still Pending—Petition May be Amended to State Cause of Action After Verdict is Returned.

1. Error lies to the overruling of a motion for judgment notwithstanding the verdict, even though a motion for a new trial is made and is undisposed of in the common pleas court.
2. A court may allow the amendment of a petition after verdict and before judgment is entered, even though the petition in its original form did not state a cause of action.

Henry & Couse, for plaintiff in error.

Kerruish, Chapman & Kerruish, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

J. Dominick brought suit against the Stowe-Fuller Company, filing a petition in which he alleges that while in the employ of the Stowe-Fuller Company he received a personal injury. In that petition he specified certain negligence which he says the Stowe-Fuller Company was guilty of, by reason of which he was injured, and he says in his petition that he was inexperienced in the work in which he was engaged at the time of the injury. He did not allege in the petition that he had no knowledge of the manner in which the sacks of lime, which fell over and injured him, were piled up. He did not allege that he did not have the means of knowledge which the defendant had of the manner in which the sacks were piled. But it is not necessary that an inexperienced man, as he says he was (he says he had only worked there ten minutes when he received the injuries) should

*Affirmed without opinion, *Stowe-Fuller Co. v. Dominick*, 75 Ohio State, 593.

1914.]

Cuyahoga County.

aver that he did not have the means of knowledge, but it is, as we understand the law, necessary that he aver that he had not the knowledge.

No demurrer was filed to this petition, nor was objection made to the introduction of evidence on the ground that the facts stated in the petition did not constitute a cause of action.

An answer was filed to the petition, the case went to trial and a verdict was returned for the plaintiff. Upon the return of the verdict the defendant moved for judgment notwithstanding the verdict. The ground upon which this motion was based was that the petition failed to state a cause of action against the defendant in favor of the plaintiff. Plaintiff was then permitted to amend his petition and such amendment was made by the insertion of the words "that he had no knowledge of the manner in which said sacks were piled." That amendment having been made, the motion for a judgment notwithstanding the verdict was overruled. It is the overruling of this motion which is claimed to constitute error. Following the overruling of this motion the court sustained a motion of the defendant for a new trial, and this case is still pending in the court of common pleas. The defendant in error claims that the case is prematurely brought into this court; that so long as the case is pending in the court of common pleas this court can not entertain a petition in error to review the order of that court.

We hold against the contention of the defendant in error in this and we do so on authority of *Davis v. Turner*, 69 O. S., 101, and we are thus brought to a consideration of the alleged error.

Section 5238, Revised Statutes, provides that:

"When upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party."

It is urged here that the petition, as it stood at the time the verdict was rendered, did not state a good cause of action against the defendant. Without stopping to read from the petition, we incline to the opinion that this is well taken, and that if a general demurrer had been filed to it, such demurrer

should have been sustained. But the court permitted the plaintiff to amend his petition before passing upon the motion, and we hold that the petition as amended stated a cause of action in plaintiff's favor. This amendment was allowed by the court under Section 5114, Revised Statutes, which reads:

"The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading by inserting other allegations material to the case," etc.

But it is said the court can not permit allegations to be made under the name of "amendment," which will state a cause of action, when no cause was before stated; that is, to use the language of the books, there must be something to "amend by" or there can be no amendment. This proposition appears to be supported uniformly by the authorities, and we must therefore inquire what is meant by the language, "there must be something to amend by." If, as is urged by the plaintiff in error there must be, in the case of a petition, such a complete cause of action stated before an amendment can be allowed, then our practice from time immemorial seems to have been wrong.

Section 5116, Revised Statutes, provides that:

"If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by amendment, with or without costs as the court in its discretion shall direct."

Section 5061, Revised Statutes, provides for demurrer to petition when it does not state facts sufficient to constitute a cause of action. This is denominated a general demurrer, and, as has already been said, it has been the universal practice to allow amendment to the petition after the sustaining of a general demurrer, where the petition undertakes to state a cause of action so plainly set forth that it is plain upon what the plaintiff relies, and where the amendment in no wise changes what the plaintiff clearly undertook to set out in the defective pleading. In the petition in this case there was something to "amend by" as those words are used in the books.

As said in *Ellison v. R. R. Co.*, 87 Ga., 690:

"When an amendment needed is one of substance itself enough to amend by does not mean the same as 'Enough to be

1914.]

Cuyahoga County.

good in substance without amendment.' On the contrary, failing to be good in substance is generally the reason why amendment in substance is needed."

The opinion of the court is most interesting, but time will not be taken to read from it.

The judgment of the court of common pleas is affirmed.

**EXEMPTION FROM EXECUTION UNDER THE STATUTE
RELATING TO NECESSARIES.**

Circuit Court of Cuyahoga County.

R. & G. DEACON V. RICHARD POWERS.

Decided, November 10, 1905.

Attachment—Term "Necessaries" Defined.

The word "necessaries" as used in the statute permitting the attachment of 10 per cent. of a debtor's personal earnings when the claim is for necessities, means necessities for the debtor or his family, and the personal earnings of a married man can not be attached on a claim for groceries furnished on his order to his mother with whom he boarded before his marriage.

C. D. Frebolin, for plaintiffs in error.

John Brown, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This is a proceeding in error seeking to reverse the judgment of the court of common pleas.

These plaintiffs sued the defendant before a justice of the peace and caused an attachment to be issued. The affidavit for the attachment sets out that the claim upon which the plaintiff brought suit was just and lawful; that he believes said plaintiff ought to recover thereon the sum of \$30.42, and that the property sought to be attached is not exempt from execution; that said property is the personal earnings of the defendant; that the claim on which judgment is sought is for necessities; that a

demand in writing for the excess over and above 90 per centum of the personal earnings of the defendant was made before bringing this action, which demand was not complied with as provided by statute. It is upon the ground that the claim upon which the suit was brought was for necessities that attachment was issued by the justice, and it was for the personal earnings of the defendant.

The defendant moved to discharge the attachment and filed an affidavit in support of that motion. In that affidavit the defendant denies all and singular the statements and allegations contained in the affidavit of the plaintiff filed herein. Second, affiant says that the claim for which this action is brought is not for necessities. Third, affiant says he is a resident of the state of Ohio and a married man living with his wife and the head and support of a family and that he is not the owner of a homestead in his own right or in the right of his wife, and that the money attached in this action is the personal earnings of affiant, earned by him within ninety days next preceding the commencement of this action, and does not amount to the sum of \$150. Therefore, affiant selects, elects to take and demands that the money herein attached be set off to him in lieu of a homestead and for the necessary support of his family.

The justice overruled the motion to discharge the attachment and an appeal was taken to the court of common pleas, where the motion was sustained, and the case is brought here on error.

The bill of exceptions filed here shows the facts to be as follows:

Plaintiffs are grocers. At the time of the transaction herein, defendant was a single man, living with his widowed mother and sisters. Defendant had had an account with plaintiffs, which had been paid by an order on his employer. The mother was in the habit of ordering the goods. When the account sued on herein was begun, defendant with his mother came to plaintiff's store. Plaintiff refused to give credit to defendant without an order from defendant on his employer to be held as security. Defendant said he would not again give an unlimited order, but would give one for \$25, which is all he would "stand for."

1914.]

Cuyahoga County.

He gave such an order. Goods were furnished on his credit by plaintiff, the mother usually ordering the same. The goods were consumed by the family. The son lived with his mother but paid board to her. Defendant is now married, and attempt is made to subject by attachment his earnings, upon this claim as for necessities.

If the goods furnished by plaintiff were *necessaries* in the sense in which that term is used in the statute (Sections 6489 and 5430, Revised Statutes), then the attachment should not have been discharged.

Under the facts of this case, were the goods necessities in that sense? They were groceries, such goods as are ordinarily necessary for the support of a family, but this defendant had no family to support. He was an unmarried man, and, unless his mother was "destitute of means of subsistence and unable, either by reason of old age, infirmity or illness to support * * * herself," there was no legal obligation resting on him to support her (Section 7017-3, Revised Statutes). There is nothing in the agreed statement that she was in such condition. He was not the head of the family. He boarded with his mother, but he paid his board. His rights in this action are exactly what they would be if he had ordered these goods furnished to any other person than his mother. They were not necessities for him, and the word necessities, as used in the statute, means such things as are necessary for the debtor and his family. That being so, we hold that as to him these were not necessities, and the attachment was properly discharged.

The judgment of the court of common pleas is affirmed.

ENDORSER RELEASED BY DIVERSION OF COLLATERAL.

Court of Appeals for Huron County.

H. E. FRAZIER V. FIRST NATIONAL BANK OF ELLWOOD CITY.

Decided, October 3, 1913.

Bills, Notes and Checks—Collateral Diverted by Payee Without Consent of Accommodation Endorser—Latter Released to the Extent He Was Injured Thereby.

Under favor of Section 8300, General Code, and the rules of the law merchant an accommodation endorser is entitled to be protected in his right to collateral securities deposited with the payee, and such payee has no right to divert the securities without the consent of such endorser, and he will be released by such act, to the extent he is injured thereby.

*C. P. & R. D. Wickham and E. G. Martin, for plaintiff in error.
G. Ray Craig, contra.*

RICHARDS, J.; KINKADE, J., and CHITTENDEN, J., concur.

Error to common pleas court.

The action in the court of common pleas was begun by the bank to recover on two promissory notes, one executed by Charles R. Brown and the other by the Huron Steel & Iron Company. Each of these notes was endorsed by H. E. Frazier, who was made a party defendant in that court. He filed an answer claiming as a defense, in substance, that at the time of making and endorsing the promissory notes on which he was an accommodation endorser, there was delivered to the bank as collateral security certain negotiable paper, the market value of which was in excess of the amount of the notes upon which the action was brought.

He avers in his answer that after the delivery of this negotiable paper as collateral security, the defendant, Charles R. Brown, with the knowledge and consent of the bank, but without the knowledge or consent of H. E. Frazier, secured from the bank said collateral security and substituted therefor certain

1914.]

Huron County.

other collateral security. He avers further that this substituted collateral security was of little value and was subsequently converted into cash and brought a sum entirely insufficient to pay the obligations signed by the answering defendant, and he asserts that the substituted security was itself withdrawn from the bank with the consent of its officers and that the proceeds arising from the sale of the collateral were diverted and applied upon other instruments than those signed by the answering defendant. The allegations contained in this answer are denied by the plaintiff bank.

The case was tried in the court of common pleas without the intervention of a jury, and that court found all the facts in favor of the bank except that the journal entry specifically recites that "the court does not determine the facts set forth in the separate answer of H. E. Frazier, in regard to the deposit of collateral security, and the withdrawal thereof."

The case as made, is one in which this court is required to decide as to the sufficiency of the answer of H. E. Frazier. The trial court evidently reached the conclusion that the allegations contained in that pleading were immaterial, or at least did not constitute a defense to the claim set forth in the petition of the bank. That conclusion is said to have been based on the holding of the Supreme Court in *Richards v. Market Exchange Bank Co.*, 81 Ohio St., 348. In the case cited, Richards had signed an obligation as a surety and sought leave of court to file an answer setting up an extension of time whereby he contended that the instrument had been discharged. The Supreme Court held in that case that the codification of the law governing negotiable instruments provided in Sections 8224 and 8225, General Code, the method and the only method by which such instruments could be discharged. It is insisted in this case that the holding so made is determinative of the issues and requires an affirmance of the judgment of the trial court.

On the other hand, it is contended by counsel for Frazier that the decision just cited, is not a controlling one under the facts disclosed in the record in the case at bar; that the statutes upon which that decision is based had no reference to a release

from liability of an accommodation maker where collateral security pledged for his benefit had been wrongfully surrendered and the proceeds diverted without his knowledge or consent. Counsel for Frazier in their brief succinctly state their contention, as follows:

"We claim that if said notes were deposited as collateral to the notes in suit, they were so deposited for the benefit of the plaintiff in error; and that if afterwards diverted to the security of some other notes upon which the plaintiff in error was not liable and without his knowledge or consent, that to the amount of their value, the plaintiff in error had a counter-claim to the notes in suit. The uncontradicted evidence of Mr. Edward Gardiner shows that they were equal in value to the two notes in suit, and so the defendant in error's notes in suit were satisfied."

"What the defendant Frazier is claiming here is that the plaintiff who is the owner of the note, has no cause of action against him by reason of certain conduct of which it has been guilty; because having in its possession certain property that it was holding in trust for the satisfaction of the note, in violation of the trust, and in fraud of the rights, of Mr. Frazier, it diverted the property to another purpose. It is not a question of whether Mr. Frazier has been 'discharged' from the note; but rather whether the plaintiff is in a position to recover from him upon the facts in evidence. Mr. Frazier may still be liable on the note to some subsequent holder for value without notice, such as an endorsee, for instance, and so not 'discharged' from the note; and yet not liable to the plaintiff by reason of the breach of trust of which it has been guilty. The authorities cited show that he, in common with sureties in all kinds of instruments, would not be liable under such circumstances to the person who had occasioned their loss.

"No attempt is made in Section 8225, General Code, to provide for a case like the one at bar. It is a case wholly outside of and independent of the note or its terms. It is simply a change in the status of the defendant, Frazier, occasioned and brought about by the breach of trust of the plaintiff. It was a situation which required of the defendant in error the utmost good faith and honest dealing. It was a situation in which the defendant in error, under the law merchant, was bound to conserve Mr. Frazier's interest and not surrender and throw away what had been put into its hands for his protection—what in fact belonged to him in equity. This duty rested upon the defendant in error,

1914.]

Huron County.

subject to any counter-claim the plaintiff in error might have against it. Mr. Frazier's defense is in the nature of damages by way of counterclaim.

"The facts stated in the answer of the plaintiff in error constitute a complete cause of action in his favor and might have been set up in an independent action for damages.

"The defense of the counterclaim is wholly consistent with the right of the defendant in error to recover on its two notes. The plaintiff in error nowhere denies his liability on the notes. He is not asking to have the notes 'discharged.' He is counterclaiming against them for the amount and value of the collaterals, up to the amount of the two notes."

The question at bar is not so much one of liability of a party on a negotiable instrument as it is the right of a surety or accommodation endorser to be protected by the preservation of collaterals which have been deposited for his benefit at the time he entered into the obligation. The courts have always jealously guarded the rights of a surety and it is inconceivable that the General Assembly by the adoption of the negotiable instrument law, intended to deprive him of all right to protection where collateral security deposited for his benefit has been improperly diverted and the proceeds applied on obligations in which he has no interest.

Richards v. Banks, *supra*, was a case involving the discharge of the instrument itself, while the case at bar is one in which the defendant sought protection of his rights as surety by insisting on the fulfillment of the contract whereby collateral security had been deposited for his benefit, and we think that case is not inconsistent with his claim.

If the argument of counsel for the bank is sound, then it would be possible in every case for a payee of negotiable paper holding collateral security to release the same at will and thereby deprive the surety of all protection. We can not believe, nor hold, that a surety, under such circumstances, is without remedy.

The subject of collateral security now under consideration does not appear to be embraced within the negotiable instrument statute, and it is provided in said statute in Section 8300, General Code, that any case not provided for, should be governed

by the rules of the law merchant. By those rules, Frazier would be entitled to the relief sought by him, if the allegations of his pleading are sustained by the evidence.

The trial court declined to pass on the issue raised in the pleading filed by Frazier. We think the court erred in so doing. For this reason, the judgment will be reversed and the case remanded for a new trial and further proceedings in accordance with this opinion.

**ASSESSMENT FOR PAVING A STREET OCCUPIED IN PART
BY A MARKET HOUSE.**

Court of Appeals for Hamilton County.

MARY EVA WOLF ET AL V. CITY OF CINCINNATI AND IRA D. WASHBURN, AUDITOR OF SAID CITY.

Decided, July, 1913.

Assessment for Improving Street—Where Fixed at Fifty Per Cent. Not Inequitable Against Abutting Property, When.

Where a market house occupies the middle of a street, extending across an entire square from one intersecting street to another, and the said street is improved with a new pavement on both sides of the market house, an assessment of fifty per cent. of the cost, exclusive of intersections, against the abutting property is not inequitable but may be legally made and will not be enjoined.

W. W. Prather, for plaintiffs in error.

O. S. Bryant, Assistant City Solicitor, contra.

JONES, E. H., J.; SWING, J., and JONES, O. B., J., concur.

Plaintiffs brought an action in the court below for an injunction against the defendant, the city of Cincinnati and the auditor of the said city, seeking to enjoin the collection of an assessment against the plaintiff's property bounding and abutting upon Pearl street in said city, between Broadway and Main streets, said assessment being made against their property to pay the expense of improving said portion of said street with bituminous pavement, setting granite curbs, etc.

1914.]

Hamilton County.

The lower court made a separate finding of facts and conclusions of law, and upon those findings and the arguments of counsel the cause was submitted to this court. The trial court found:

"That said Pearl street between Broadway and Main streets in said city is two blocks in length, crossing Sycamore at a point one-half the distance between Broadway and Main street, and that the portion of Pearl street between Broadway and Sycamore street is divided into two streets by a public market house running lengthwise of said Pearl street, which market house is bounded on both sides by said improvement for the entire length of said market house; that said market house is 400 feet long and 52 feet wide, and that portion of said Pearl street between Broadway and Sycamore that lies north of said market house is known as North Pearl street and is 400 feet long by 33 feet wide between curbs, and that that portion of said Pearl street between Broadway and Sycamore street lying south of said market house is known as South Pearl street and is 400 feet long and 33 feet wide between curbs, and that both said North Pearl street and said South Pearl street were included and improved under said resolution and ordinance."

It was also found by the lower court that the market house was a substantial brick structure containing stalls for the use of persons selling vegetables, fruits, etc., for which the city of Cincinnati receives an annual rent for each stall, and in which said merchandise is sold for profit.

It is contended by the plaintiffs in error, all of whom are owners of property abutting on said Pearl street, that the assessments for said improvement are illegal and void for the reason that no part of the cost of said improvement was assessed against the city of Cincinnati on account of said market house, or that, admitting that property is not assessable, the frontage of said market house upon said so-called North and South Pearl streets should be included in estimating the total frontage and after same is done their property should only bear its ratable portion of said cost.

The resolution declaring it necessary to improve said portion of said Pearl street provided as follows:

"That fifty per cent. of the whole cost of said improvement, less the cost of intersections, shall be assessed by the foot front-

age on all lots and lands bounding and abutting upon the proposed improvement, which said lots and lands are hereby determined to be specially benefitted by said improvement."

The ordinance passed later contained a similar provision. It will thus be seen that the city assumed the burden of paying fifty per cent. of the cost of said improvement, after taking out the cost of the intersections. The percentage which the city shall bear in making an improvement is to be determined by council in each particular case. It seems to us to be the policy of the law that council should take into consideration all the circumstances and conditions of each improvement, and fix such a percentage to be borne by the city as will be equitable and just; in doing this it considers any public land that may be situated along the line of the proposed improvement or property which for any other reason might be exempt from assessment, the nature of the property assessed, and its ability to bear the burden placed upon it.

We must assume that in fixing the percentage in this case all those matters were taken into consideration by council and that the city undertook to divide this work equally with the abutting owners, because of the position of the market house in the center of said street. It strikes the court that this division was a liberal one upon the part of the city and that there is nothing inequitable in the assessment as finally made.

It has been held that an assessment can not be levied against public property such as this market house was, for street or sewer improvements, and we think the case of *George Mathers et al v. City of Norwood et al*, decided by this court and reported in the *Court Index* of February 21, 1910, is decisive of the question raised in this case. In its opinion, by Giffen, P. J., the court says:

"The resolution of the city council 'that 98 per cent. of the whole cost of said sewers should be assessed by the front footage upon all lots and lands bounding and abutting upon said improvements was not intended to embrace the strip of ground in the middle of the street which was dedicated for park purposes, because such public property is not liable to assessment for a sewer improvement. *City of Toledo v. Bd. of Education*, 48 O. S., 83."

1914.]

Hamilton County.

It is contended by counsel for plaintiffs in error that the above case was decided upon the ground that the park in the center of the street in Norwood had natural drainage and was therefore not subject to assessment for a storm sewer. It is true that in its finding of facts the court finds such to be the case, but the opinion above quoted shows that the court clearly held that the property was not assessable and was not to be considered in estimating the frontage. In its conclusions of law in the Norwood case the court found that "public property" is not liable to assessment for sewer improvement. Counsel for plaintiffs in error, in their brief, point out that in the resolution and ordinance passed by council, all the lots and lands bounding and abutting upon the improvement were found and determined by council to be "specially benefitted by the improvement." This language, they claim, embraces the market house. We think not. It embraced only such lots and lands as could be assessed for said improvement. The resolution and ordinance were adopted and passed under requirements of law as notice to the owners who were to bear their ratable portion of the expense according to the "foot frontage" plan.

The words of the ordinance "which said lots and lands are hereby determined to be specially benefitted by said improvement" do not change or fix the mode of assessment, and refer only to the lots and lands which can be assessed. The city pays the whole cost for intersections and fifty per cent. of the remainder and in fixing this apportionment, liberal as it appears to be upon the part of the city, the location of the market house in the center of the street was obviously considered.

Judgment affirmed.

**ALIMONY ALLOWED INSANE WIFE DIVORCED BY
HER HUSBAND.**

Court of Appeals for Wayne County.

AMOS KNESTRICK V. LIDE KNESTRICK.

Decided, February Term, 1913

Divorce and Alimony—Obligation to Support Wife Continues After Legal Separation Without Her Fault—Considerations of Equity and Public Policy Govern the Amount to be Allowed.

A decree of divorce granted a husband upon the ground of impotency of his wife, after they had lived together in cordial and affectionate relation for sixteen years and after she had become insane, can not be said to be based upon the wife's aggression or fault, and does not absolve him from liability to support her; hence, reasonable alimony should be allowed, based upon the husband's financial condition and ability to support her, and her pecuniary needs, such as will save her from becoming a charge on the charity of her friends, relatives or the state.

Wieser & Ross, for plaintiff.

Frank Taggart, contra.

SHIELDS, J.; VOORHEES, J., and MARRIOTT, J., concur.

Appeal from common pleas court.

This was an action in the court of common pleas of this county brought by the plaintiff against the defendant for divorce. The defendant, an insane person, through her guardian, filed an answer and cross-petition claiming alimony. A divorce was granted by said court to the plaintiff and the action was appealed to this court upon the allowance of alimony, and the same was heard upon evidence.

It appears that these parties were married in October, 1879, and lived together as husband and wife until July, 1895, when the defendant became insane and was so adjudged by the probate court of this county. That no children were born of such marriage. That in July, 1906, Dr. A. L. Hoisington, a brother of the defendant, was appointed guardian of her person and estate.

1914.]

Wayne County.

That in September, 1909, the defendant left the home of the plaintiff in Wooster, Ohio, and went to the home of said guardian in Fremont, Ohio, where she remained, and the plaintiff continued to reside in Wooster. That after the defendant was adjudged insane, she was committed to the Massillon State Hospital from which she was released, upon the application of the plaintiff, who afterward placed her in a private hospital, and failing to show improvement in her mental condition, she was again committed to the Massillon State Hospital where she remained some time, and later on returned to live with her husband where she remained until she went to Fremont, as stated. That the plaintiff is now and for several years past has been a practicing physician in Wooster. That in 1906 he made an assignment for the benefit of his creditors, and shortly afterward paid his creditors in full. That at that time, under said assignment, the defendant's contingent right of dower in the plaintiff's property was fixed at \$628.45, which was paid to her guardian. That the defendant then owned and now owns the one undivided half interest in seventy acres of land in Wayne county, Ohio, valued by different witnesses at figures ranging from \$50 to \$85 per acre, from which real estate she receives an annual income of \$100, which said sum before 1906 was paid to her husband, and after that time to her guardian. That the plaintiff's income from said practice averages at least \$10 per day, less expenses, and that he possesses property valued at about \$3,800.

In his petition filed for a divorce the plaintiff says that prior to the time the defendant became insane "she was impotent and guilty of gross neglect of duty toward this plaintiff in that she refused to copulate and cohabit with him and neglected other duties." The guardian of the wife by answer denies the material allegations in said petition, and in a cross-petition charges the plaintiff with gross neglect of duty in failing to provide his wife with the necessities of life and that she has been so supplied by the charity and kindness of her friends, and that her separation from the plaintiff was caused by the plaintiff's ill treatment of her, to which said cross-petition the plaintiff filed a reply in the nature of a general denial.

The appeal here is upon the allowance of alimony made by the court below. The rule laid down in the case of *Cox v. Cox*, 19 Ohio St., 502, has invariably been recognized and adhered to by this court in cases of this kind in reopening for trial all the issues of fact upon which the rights of the parties in respect to alimony depend. Ordinarily the husband is not called upon to support his wife when she abandons him and his home and voluntarily goes elsewhere to live, especially if the home so offered her is a reasonable one under the circumstances. This leads us to inquire of the circumstances under which the defendant is alleged to have left the plaintiff's home. The evidence upon the part of the plaintiff tends to show that she was provided with a comfortable home, reasonably well furnished, that he cared for and supplied the defendant with clothing and other necessities of life, and that the relations between the parties, at least up until July, 1895, were most cordial and even affectionate. The plaintiff himself testified that up to said date "she was helpful about the house and was a wife to me." He further testified that after said date he continued to treat and provide for her properly, and so continued until about the — day of September, 1909, when Mrs. Hoisington, the wife of the defendant's said guardian, while visiting at the plaintiff's home, and while he was absent and without his knowledge, persuaded the defendant to pack her clothing and personal effects and store the most of them with a neighbor, and go to her home in Fremont with her, and where, as before stated, she has remained. Having left the home under these circumstances, the plaintiff testified that since said time he has made no effort to have his wife return to him, that he has not visited her, that he has not seen her, that he has not written to her nor to said guardian or other person in Fremont about her, nor has he contributed or offered to contribute anything to her support, except the sum of \$50 allowed by this court at its former term as alimony pending the suit. Opposed to this is the testimony of Mrs. Hoisington, who testified that the defendant frequently visited her and her husband in their home in Fremont prior to September, 1909, that she remained there with them weeks and even months at a time, and that the plaintiff

1914.]

Wayne County.

iff at least during some of such visits also visited them while the defendant was visiting them. She further testified that prior to the — day of September, 1909, when the defendant left her home in Wooster, she had arranged with the plaintiff that she (the witness) was to visit at the plaintiff's home and that the defendant was to return to her home in Fremont with her, and that in pursuance of such arrangement she visited the plaintiff at his home and the defendant returned to Fremont with her. That the plaintiff had full knowledge of the defendant leaving his home, and assented thereto, and that he was at his home when she so left. She further testified that she found the defendant lodging alone, in one of the back rooms in the plaintiff's house, upstairs, that she had no shoes and was otherwise wanting in wearing apparel. Upon calling the attention of the plaintiff to this condition, the witness testified that the plaintiff answered "that if any purchases were to be made for her they would have to be made out of moneys coming from her own property." That on other occasions when visiting at the plaintiff's house she testified she observed the defendant's necessitous condition and that she (the witness) had supplied her with clothing. Said witness also testified that the defendant is a great charge to her family, requiring her meals to be carried to her in her room and requiring also other special and personal services which one in her frail and mental condition craves. The guardian also testified that when he last visited the plaintiff, the defendant was occupying a back room alone, upstairs, in the plaintiff's house, and when she last came to his house the defendant was poorly clothed. He also testified to the nature and extent of services necessary to her proper care, that she is in poor health and that her condition frequently requires medical attention, adding that "if she was well mentally, she could not maintain herself." The plaintiff denied that the defendant was not properly cared for in his house, and he also denied that he did not furnish her all needful clothing, and he says the defendant refused to wear some of the clothing he did furnish because of her refusal to see people who called at his house and because of her aversion to dress.

It will thus be seen that the evidence is conflicting as to the circumstances under which the defendant left the plaintiff's home, but it may well be said that whatever the circumstances, they are immaterial in the face of the admitted fact that the defendant was then an insane woman. With her reason lost, she was no longer a responsible agent. In her conduct, she was not accountable to the civil law or to the laws of society. True, the decree of divorce seems to have been granted on the ground of her impotency—a strange charge to be made by the plaintiff after these parties had been married and presumably cohabited together for some sixteen years, and after she had been adjudged insane—an issue with which this court has nothing to do, but the fact that a divorce was granted does not absolve the husband from liability to support his wife. The cause, if there was a cause, was not of the wife's aggression or sinning, for her reason was dethroned by a power over which she had no control. The charity of the law does not refuse its benefits to one so afflicted, much less punish the victim. The sacredness of the family relation supplemented with the husband's obligation, under the circumstances here shown, unite in emphasizing this defendant's claim to consideration upon the court, and while the plaintiff's financial condition is not to be ignored but considered on the one hand, the helpless and stricken condition of the defendant is not to be lost sight of on the other. The plaintiff is fifty-nine years of age, apparently in good health, possessed of a practice in medicine yielding him an average income of \$10 per day, less expenses, has about \$3,800 worth of property and has at least a fair earning capacity in his profession. The defendant is fifty-four years of age and is possessed in her own right of her inchoate right of dower and her interest in certain real estate as hereinbefore stated. Such reasonable allowance of alimony should be made the defendant in view of the financial condition of the husband as will save her from becoming a charge on the charity of friends, or relatives, or the state. This view we think is sanctioned both by good morals and by the practice of our courts. Upon the subject of granting alimony the distinguished

1914.]

Greene County.

judge announcing the opinion in *Fickle v. Granger*, 83 Ohio St., 106, says:

"Alimony is an allowance for support, which is made upon considerations of equity and public policy. It is not property of the wife recoverable as debt, damages or penalty. It is based upon the obligation, growing out of the marriage relation, that the husband must support his wife, an obligation which continues even after a legal separation without her fault."

Considering that the plaintiff has not paid anything toward the support of the defendant since September, 1909, except the alimony allowed her *pendente lite*, hereinbefore referred to, we are of the opinion that the defendant should have and it is hereby decreed that she have as alimony to this date the sum of \$500 payable as follows, to-wit: \$250 on or before March 1, 1913, and \$250 on or before April 1, 1913, and the further sum of \$400 per year hereafter, commencing April 1, 1913, payable quarterly, that is to say, \$100 every three months from April 1, 1913, such payments to continue until the further order of this court.

**NATURE OF DEPOSITS MADE BY A TOWNSHIP TREASURER
OF TOWNSHIP FUNDS.**

Court of Appeals for Greene County.

IN RE OSBORN BANK.

Decided, October 31, 1913.

Depositories of Public Funds—Bank Receiving Township Funds from Township Treasurer Hold Them as a Special and Not a General Deposit—Trust Status Not Lost—Taxes Collected by a Deputy County Treasurer in Villages Having no Local Bank, But Deposited in a designated Bank of Deposit Are General Deposits—Undivided Tax Funds.

1. The proviso of Section 12873, General Code, exempting the acts of township and other treasurers depositing certain public funds in the banks prescribed from the operation of a drastic criminal stat-

ute, does not enlarge the authority of such treasurers nor authorize a deposit for other than safe-keeping; hence, a bank receiving funds deposited by a township treasurer, no attempt being made to comply with Section 3320, General Code, *et seq.*, providing for township depositories, succeeds *prima facie* to the treasurer's possessory title to such funds and as *quasi* trustee for their safe keeping as a special and not a general deposit.

2. Section 4294, General Code, authorizing the deposit of municipal moneys in certain banks as special deposits, is intended only to legalize such deposits, retaining the civil liability of the treasurer upon his bond, and there is nothing to warrant any inference that the treasurer's duty or authority over such trust funds is changed, having no authority to convert such funds to his own or any other's use. Hence, village funds deposited in a bank by a village treasurer upon his sole authority do not lose their trust status or become general deposits. Whether the subsequent knowledge or acquiescence of his sureties to such deposits is equivalent to prior assent, *quaere*.
3. The deposit of taxes collected by a deputy county treasurer under Sections 2746, 2748, General Code, in villages having no local bank of deposit, but deposited by him in a designated bank of deposit on the day of payment, complies with the statute, whether sent first to the county treasury or placed in a depository bank, and become "undivided tax funds" under Section 2737, General Code; and, where entered upon the pass book among the interest bearing deposits and allowed to remain, and is entered on treasurer's record as "deposited in depository" and certified by the auditor, constitute such funds general and not special deposits.

Frank L. Johnson and *M. J. Hartley*, for intervening petitioners.

John C. Shea and *Frank A. Davis*, for state banking department.

ALLREAD, J.; FERNEDING, J., and KUNKLE, J., concur.

Appeal from common pleas court.

These cases arise upon intervening petitions seeking priority of certain public funds as special deposits.

The public funds involved in the intervening petitions are:

- (1) county funds of Greene county in the sum of \$5,383.71;
- (2) village funds of the village of Fairfield in the sum of \$1,503.72; and
- (3) funds of the treasurer of Section 16, etc., of Bath township in the sum of \$721.87.

1914.]

Greene County.

The Bank of Osborn, an incorporated banking company located in the village of Osborn, Greene county, Ohio, was on June 18, 1913, closed by the state banking department and is in process of liquidation. There were at the time the bank closed sufficient funds on hand to liquidate the claims represented by the intervening petitions.

The question in issue is: Were the funds deposited under such circumstances as to constitute them special deposits and entitled to preference, or were they merely general deposits?

In consideration of the status of public funds in the hands of a public treasurer we may start with the proposition that such treasurer, under the clearly established law of this state, is a mere custodian of the funds and has no authority by virtue of his office to loan or invest them. *Eshelby v. Cincinnati Bd. of Ed.*, 66 Ohio St., 71.

The preservation of the public funds has under the policy of our state been the subject of special care, and to uphold a transfer of title and an investment of the public moneys a clear legislative expression and a compliance with the prescribed conditions in all of its material features is required.

Where a bank receives from the treasurer public moneys known by it to be such it succeeds *prima facie* merely to the treasurer's possessory title and as *quasi* trustee for safe keeping of such funds, and the burden is upon the bank if it claims greater title to show statutory authority and warrant to support its right to convert the funds to its own use.

In respect to the township funds we find there was no attempt to comply with the depository act. These funds were deposited solely upon the authority of the treasurer. The claim that this fund was deposited generally is founded upon the proviso of Section 12875, General Code, as follows:

"The provisions of Section 12873 shall not make it unlawful for the treasurer of a township, municipal corporation, board of education or cemetery association to deposit public money with a person, firm, company or corporation organized and doing a banking business under the laws of this state or of the United States, but the deposit of such funds in such bank shall not release such treasurer from liability for loss which may occur thereby."

This proviso is a part of a criminal act of a very drastic nature designed to safeguard the public funds. The proviso was intended to except the deposit of certain public funds in certain banks from the operation of the criminal statute. It is not intended to enlarge the authority of the treasury over the funds nor to authorize more than a deposit for safe keeping.

The village funds were also deposited by the village treasurer upon his sole authority. It is, however, claimed that his sureties knew or afterwards discovered and acquiesced in the deposit of the funds so as to bring the case within the scope of Section 4294, General Code, which provides as follows:

“Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of such funds, and such deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn. All profits arising from such deposit or deposits shall inure to the benefit of the funds. Such deposit shall in no wise release the treasurer from liability for any loss which may occur thereby.”

We do not stop to decide whether subsequent knowledge and acquiescence of the sureties is, within the meaning of the statute, the equivalent of prior assent. We hold that Section 4294 is consistent with and is intended only to legalize special deposits. Like Section 12875, General Code, the civil liability of the treasurer upon his bond is retained and there is nothing to warrant the inference that the treasurer's duty or authority over the trust funds was to be vitally changed. The treasurer had no authority to convert the funds to his own use and it follows that he had no authority to authorize another to do so.

It is true that Section 4294 contains the provision that all profits upon deposits shall inure to the benefit of the fund. This was intended, in our judgment, not as a license but as a precaution. There were undoubtedly cases when profits on deposits were allowed and paid public treasurers, and the Legislature by this provision intended to fix the public policy with reference thereto. As a part of this act the depository law was provided.

1914.]

Greene County.

In this and all other depository laws there are stringent safeguards thrown about the general deposit and investment of public funds. Care is taken as to the amount of interest, the nature of the special security to be given, and it is inconceivable that the entire body of the fund was intended to be authorized to be embarked in speculation or investment upon the sole authority of the treasurer and his general bondsmen. The status of the county funds rests upon a more complicated state of facts and depends upon a construction of various sections of the statute.

The funds in controversy and sought to be declared as special deposits represent taxes collected by a deputy treasurer in Bath township on June 13 at Fairfield and on June 14 at Osborn. The villages are both in Bath township and a short distance apart. The collections were made under authority of the following statutes:

"2746. When, in his opinion, necessary, the county treasurer may open not to exceed one office in each township for the receiving of taxes. Such office shall be in a city or village in which is located a bank of deposit. The treasurer, his deputy or clerks, may attend at such office and receive taxes on any day or days prior to the twentieth day of June and the twentieth day of December of each year. They may remove from the county treasury to the place of collection records necessary for the receiving of taxes upon the day or days so fixed for that purpose.

"2748. For the purpose of transportation, the county treasurer may deposit temporarily in any bank of deposit located at such place of collection any money received in the payment of taxes. A bank or banks receiving any such deposits shall deposit with the county treasurer such securities as the treasurer deems sufficient, subject to the approval of the county commissioners. The liability of the treasurer for any losses of money so deposited shall be the same as provided in this chapter in case of deposits by the county treasurer in county depositories."

There is a contention that the deputy treasurer was not authorized to open books or receive taxes in the village of Fairfield, because of its having no local bank of deposit. But we find no substance in that objection. All the taxes collected there as well as at Osborn were actually deposited in the Osborn bank

on the day of their payment, and it remains now to ascertain their status.

The Bank of Osborn was a bank of deposit within the meaning of Section 2748, and, therefore, capable of receiving this fund for transportation.

It is also claimed to be a county depository with right to receive funds in that capacity. If the funds were received for transportation, whether a special bond was given or not, the deposit would be special and entitled to preference.

On the contrary, if the funds were lawfully deposited in the bank as county depository and as an interest bearing deposit, the bank had a right to commingle and use the funds for profit, thus creating a general deposit.

It is, therefore, quite important to ascertain in what capacity these funds were held at the time the bank failed. The determination of this question rests upon both law and fact. The legal contention is:

First, that the deputy treasurer was authorized only to deposit the tax collections for transportation, and second, that the funds so collected were not subject to deposit in the official depository.

The deputy treasurer was authorized to represent his principal. The treasurer, therefore, who made the collections of taxes, was authorized to deposit it. There is no statutory requirement, express or implied, that collections under Section 2746, General Code, were first to be transported to the county treasury and then to a depository, nor can we conceive of any necessity or consideration of public policy requiring such formality. The authority for transportation is general and may authorize a transportation to a depository as well as to the county treasury.

We are, therefore, inclined to adopt a practical construction of these two statutes and hold that the funds might be delivered directly to the county depository and the process completed by a proper system of bookkeeping.

Upon the question whether these funds were subject to deposit in an official depository we hold they are included in the

1914.]

Greene County.

clause "undivided tax funds" used in Section 2737, General Code, and, therefore, subject to deposit in a county depository.

Upon the question of fact we think the inference is clear that a deposit under the depository law was intended. The deposits were entered upon the bank pass book among the interest bearing deposits and allowed to remain. No certificate of deposit was taken as is usual in cases of mere transportation and the fund was entered in the treasurer's record as "deposited in depository," and was so certified to the auditor.

This inference arising from the circumstances is confirmed by the testimony of the deputy treasurer who made the deposits, as follows:

"How did you come to do that of your own volition? (Referring to the deposit in the Osborn bank.) A. It had been the custom. It is one of our legal depositories and if it hadn't been I would have taken a certificate of deposit and deposited it when I came home for the purpose of transportation. We do that at other places—Cedarville, Bowersville and Jamestown."

This brings us to a consideration of the regularity of the designation and qualification of the Osborn bank as a county depository.

The resolution authorizing bids under the depository law fixed the period at two years instead of three. This was not a vital error. The designation of depositories thereunder would be good for two years and until a new depository—temporary or permanent—was designated to take the funds.

The act of April 11, 1913, Section 2715, General Code, took effect a few days before the depositories were designated. This amendment provided for the designation of two kinds of depository—inactive and active. The inactive depository was intended to receive funds not required for current or immediate use. The active depository was required to be located at the county seat and was designed to meet current and immediate demands.

It does not appear that the commissioners expressly designated any of the depository banks as active or inactive. The call for bids was general and it does not appear that any stipu-

lation in this respect was contained in the bids or in the resolution of acceptance by the commissioners.

The bank of Osborn not being located at the county seat was only eligible as an inactive depository, and the presumption of regularity of official proceedings justifies the inference from the making and acceptance of its bid that the Osborn bank was intended as an inactive depository, and the record may be construed as the equivalent of such designation.

So far as is shown in the evidence the deposits, and especially those in controversy, were of a character to be properly deposited in an inactive depository.

The bond given by the Osborn bank qualifying it as depository was in proper form and duly accepted. The designation and qualification of the Osborn bank as such depository and the deposit of said county funds therein as a public depository, as an interest bearing fund, constitutes the same a general and not a special deposit.

It, therefore, follows that the intervening petitions of the treasurer of Section 16, Bath township, and of the village of Fairfield should be sustained, and that of Greene county should be dismissed.

These cases are very interesting and involve very doubtful questions and a construction of the new set of statutes in relation to depositories, and we are not favored with any direct decisions of any of the courts of the state but we have endeavored to work out what we believe to be a correct solution under the facts in the case.

1914.]

Lucas County.

A TRIANGLE OF RESPONSIBILITY FOR AN UNUSUAL ACCIDENT.

Circuit Court of Lucas County.

ALVIN M. WOOLSON V. JOSEPH HESSLING, THE TOLEDO PAPER BOX COMPANY AND THE MONARCH CANDY COMPANY.

Decided, 1904.

Negligence—Package Drops from the Window of the Elevator When at the Fourth Floor—And Badly Injures a Drayman Standing at Entrance to Building—Elevator Operator Employed by Tenants of the Building Who Deducted His Wages from Their Rent—Negligence Charged Both in the Construction of the Building and in Its Operation—Determination as to How Liability Should be Fixed.

W was the owner of a four-story brick factory building, the entire fourth floor of which was leased to a box company and parts of other floors to a candy company. The building was supplied with a freight elevator, which was operated by a man employed jointly by the several tenants, who respectively deducted his wages from the amount of rent due from them each month. The tenant on the fourth floor had some bundles of paper carted to the building, a number of which were placed on a hand truck by the elevatorman who ran the load on the elevator and raised it to the fourth floor, where the truck was made to tilt by one of the wheels running off the elevator, and a bundle of paper slid off the truck and through the window opening into the elevator shaft, and in falling to the street below struck and seriously injured the drayman who had brought the paper to the building. *Held:*

1. That the candy company was not responsible for the condition of the elevator, which made it possible for one wheel of the truck to run off and cause the load to tilt; or for the open window; or for the alleged negligence of the elevator man, since at the time of the accident he was not employed in its service.
2. That the owner of the building was responsible for the condition of the elevator and elevator shaft, but not for the alleged negligence of the elevator man.
3. That the tenant of the fourth floor, to which the load was being taken, was responsible for any negligence of the elevator man in making use of the elevator in a manner and under conditions which should have been known to him to be unsafe.
4. The determination as to what in the negligent chain of causation was the proximate cause of the accident should be left to the jury,

under instructions which relieve the owner of the building from liability for any independent cause of the accident which could not reasonably have been anticipated.

PARKER, J.; HULL, J., and HAYNES, J., concur.

This proceeding is brought to obtain a reversal of judgments of the court of common pleas in this case. The action in the court below was by Hessling against Woolson, the Toledo Paper Box Company and the Monarch Candy Company, on account of alleged negligence on the part of these defendants resulting in an injury to the plaintiff. The trial resulted in favor of the Monarch Candy Company directed by the trial judge, a verdict in favor of the paper box company upon a submission of the issues to the jury, and a verdict by the same jury in favor of Hessling for the sum of \$2,000 against Woolson. Motions for new trials were made by both of the defeated parties. Woolson proceeds here as plaintiff in error, to obtain a reversal of the judgment against him; and Hessling, by a cross-petition in error, asks for a reversal of the judgment in favor of the Toledo Paper Box Company and the Monarch Candy Company. For a statement of the facts and the issues as presented by the pleadings, I shall adopt, in a large measure, an abstract of the pleadings found in one of the briefs of counsel.

It is alleged in the petition that for some time prior to and upon May 22d, 1902, the defendant, Alvin M. Woolson, was the owner of a four-story and basement brick building, known as the Berlin Block, situated at the northwesterly corner of St. Clair street and Jackson avenue in the city of Toledo; that on said date, and for some time prior thereto, the defendants, the Toledo Paper Box Company and the Monarch Candy Company each corporations of the state of Ohio, were, and for some time past had been renting separate parts of said building from the defendant Woolson; that the Toledo Paper Box Company, for the purposes of its business, occupied the entire fourth floor of the building, and the Monarch Candy Company, for the purposes of its business, occupied a portion of the basement and a portion of each of the first, second and third floors thereof.

1914.]

Lucas County.

When the box company and the candy company each took possession of the premises occupied by them respectively, there was at the rear of the building an elevator shaft about six feet square, which extended from the basement forming the westerly or outer side of the elevator shaft, a window being constructed in this wall at each floor. In the elevator shaft there was a freight elevator, provided with a platform or floor about six feet square, and this elevator was equipped for the use of certain of the tenants of the building, subject to terms and conditions herein-after considered, for elevating and lowering goods, wares and merchandise up and down the elevator shaft to and from the several floors of the building in the conduct of the business of said tenants, respectively.

On May 22, 1902, the Toledo Paper Box Company employed the Moreton Truck & Storage Company to haul certain bales of paper belonging to the box company to the elevator shaft in the rear of the Berlin Block, where same was to be unloaded.

Joseph Hessling, the plaintiff, was then in the employ of the truck company, as a drayman, and at the direction of the manager of the truck company, about 9:30 A. M. drove a dray loaded with this paper to the entrance of the elevator shaft at the rear of said building and at the direction of the box company was there engaged in unloading the paper from the dray onto the ground.

In the amended petition, it is alleged by plaintiff, that whilst he was so engaged, one Henry K. Strayer, who was operating the elevator, loaded a truck with paper, in the rear of the building, drew it onto the elevator and elevated same to the fourth floor, and that while said Strayer was unloading the truck off of said elevator onto the fourth floor of the building, he carelessly caused some of the wheels of the truck to run into an opening adjacent to the elevator platform between the elevator platform and the westerly wall of the building, thereby causing the truck to partially overturn and a portion of said paper, loaded on the truck, to fall out of the window of the building located in said elevator shaft above the fourth floor striking plaintiff on the shoulder, and fracturing his arm and otherwise injuring him.

The box company further alleges that on May 22d, 1902, Henry K. Strayer was engaged in loading paper belonging to the box company upon a four wheeled truck, owned by it, and elevating said truck, when loaded to the fourth floor of the building, and delivering the paper from said truck to the box company at the fourth floor; that said Strayer, while so engaged, loaded said truck with paper and raised same to the fourth floor, when one of the wheels—it then proceeds to describe the circumstances of the accident about as described in the other pleading. And this answer also contains about the same allegations as are contained in the other pleadings as to the construction of the elevator shaft.

The box company, in its answer, further alleges that said elevator and elevator shaft were erected, constructed and maintained by Woolson; that at the fourth floor of said building said elevator floor is separated from the outer wall of said building by a space of about twelve inches, extending the entire length of said elevator, said space being the opening into which the wheel of the truck slipped; that Woolson had constructed between each floor of said build in said elevator shaft, a window to furnish light, the window at the fourth floor in said shaft being the window through which the bale of paper fell; that said elevator shaft and elevator had been constructed by Woolson long prior to the time when possession was taken of said fourth floor by the box company, and was in the same condition on May 22d, 1902, when the accident complained of occurred, as it was when possession was taken of said fourth floor by said box company; that said Woolson retained and exercised control over said elevator and elevator shaft, jointly with the candy company, and that the box company had no control over and was not responsible for the construction, maintenance or repair of said elevator and elevator shaft. All allegations in the amended petition, charging the box company with negligence, are denied.

So it will be seen, as stated by counsel upon the hearing, that this is a sort of triangular contest—I do not know but it has more sides than that. Now when the case came to be tried, there

box company and Woolson are liable, provided they find them to be negligent."

Now we have read the evidence in this case very carefully, including the written evidence consisting of these leases made by Mr. Woolson to these various tenants, and the evidence respecting alleged oral modifications of these leases; and we conclude that the summing up by the trial judge in passing upon these motions correctly states the obligations of these parties and the issues to be submitted to the jury, *i. e.*:

First. That the candy company was not liable because of any responsibility for the condition of the elevator or the elevator openings at the fourth floor, and was not responsible for the conduct of Strayer, since he was not in its service, nor subject to its direction or control when taking the paper to the fourth floor for the box company; and the judgment of the court below as to the candy company will be affirmed.

Second. That Woolson was responsible for the condition of the elevator and the elevator shaft, but not for the conduct of Strayer, since he was not an employer of Strayer.

Third. That the box company was not responsible for the unsafe condition of the elevator shaft or elevator, due to defect in floor or failure to provide a safety guard for the window. But the box company was responsible for any negligence of Strayer in making use of the elevator under conditions and in a manner known to him to be unsafe and dangerous.

We come now to the consideration of the questions whether the verdict against Woolson is against the manifest weight of the evidence, and whether the verdict in favor of the box company is against the manifest weight of the evidence.

I should say that the evidence discloses that there was this space, not of eighteen inches, but of about twelve inches, I believe—I have not had an opportunity to verify these figures since it devolved upon me to deliver the opinion in this case, so I shall have to give them simply in a general way and rectify them afterwards, but I believe the space was about twelve inches between the floor of the elevator and the west side of the building at the fourth floor of the building, when the elevator was

was necessary to back the truck toward the window in order to turn it and take it out of the side door to the fourth floor, the doors from the elevator at this floor being at the side of it. In this operation the truck was backed toward the window, so that one of the wheels dropped down into this space where this offset of about four inches was; that this threw the truck out of perpendicular, and it dropped down on one side and elevated at the other, and the bundles of paper slipped off of the truck; they were higher up than the sill of the window, and some four, I believe, of the bundles went out of the window and down upon the drayman who was below, injuring him.

It is not claimed, nor does it appear that the plaintiff was guilty of any negligence in the premises. It also appears that Mr. Strayer had been employed in operating this elevator for some time, and that he was well advised of all of the conditions; that in backing this truck with this load upon it, he appreciated the fact that the operation was dangerous. He so says in his testimony, in fact. It also appears that this operation might have been obviated, that is to say, there were many ways of elevating this paper to the fourth floor and unloading it there other than this dangerous way; that the truck might have been loaded at the lower floor, without being removed from it; it might have been placed also in a position so that it could have been backed or taken off at the upper floor without any turning, or, if taken out to be loaded, it might have been brought in and turned at the lower floor without any danger from the operation. or at the upper floor even, it could have been taken out as it was without turning. There might have been measures taken in the blocking of the wheels or otherwise to prevent the wheel from dropping into this offset, or so many of the bundles as come up higher than the sill of the window might have been unloaded from the truck before the truck was moved, or the bundles might have been fastened in some way upon the truck; the truck might have been provided with some sort of a railing to prevent the bundles from dropping off, and, speaking of the circumstances as they were on that day, on that occasion, of the conduct of Mr. Strayer, I mention that he might have safely carried all these

to him that would have obviated the danger. We can not understand how it can be said, logically and fairly, that because of his passive negligence in permitting a dangerous condition to continue, and his presumed anticipation of this concatenation of circumstances and the result, the like of which might not happen again in a millenium, Woolson should be deemed guilty of negligence in law, while Strayer, knowing all that Woolson knew, and all that Woolson may be presumed to have known, and besides being the active, independent human agent, who, of his own volition put these potentialities in motion, and thereby made them a part of a chain of actual causes and agencies resulting in this injury, may be said to be innocent of any fault or negligence in the premises.

That Strayer was acquainted with all the surroundings and conditions, and that he regarded the situation as dangerous when he came to try to take the truck from the elevator appears from his own testimony: Passing by the question whether he negligently loaded the truck, though he might have put or turned the truck upon the platform at the lower floor and so avoided the accident; though he might have placed some hindrance to the wheel leaving the elevator platform and so avoided the accident; though he might have taken a few of the bundles from the truck before he attempted to turn it and so avoided the accident; though he might have closed the window and thereby in all human probability avoided the accident, he voluntarily chose the only course that can be conceived of under the circumstances, that would produce the accident, and the accident happened, and yet the jury said he was not guilty of negligence that was a proximate cause of the injury. This verdict is, we think, manifestly and clearly against the weight of the evidence.

As to the verdict against Woolson. Is it against the weight of the evidence? As I have indicated, we regard the happening of this accident as one scarcely to be anticipated by one not on the ground to observe the conduct of Strayer in loading and managing the truck. And yet we are not prepared to say that a jury may not justly and properly hold Woolson also responsible for the result. But we are of the opinion that his legal re-

swinging doors, opening outward and meeting at the center of the opening. It does not appear that these doors could not be closed and fastened, nor that any glass were absent from these sash. It is apparent that with the doors closed or with the lower sash down in place, this paper could not have slid from the window. The parcels were too large to go out through the sash, unless both glass and the wooden part of the sash between them should be broken. It is not made to appear that the lower sash, if down, would not have prevented this accident. As the paper could not have gained much momentum before striking it, unless it was in a very frail condition, the sash must have presented an effective barrier to its further progress.

It is charged that Woolson did not furnish bars or other guards or barriers at this window opening. The burden of proving this rested upon the plaintiff. We think that he has failed to establish this by the evidence, and that therefore the verdict, as to Woolson, is manifestly against the weight of the evidence. Woolson was not an insurer of the safety of one in the situation or sustaining the relation of the plaintiff, toward him? And for his safety, Woolson was bound to do no more than exercise ordinary care. It does not appear that he had not done so in making the provisions mentioned for the closing of the openings of the windows. He was not bound to anticipate that the tenants would not make use of these appliances or avail themselves of these provisions, but would, under circumstances where it would be dangerous and negligent to do so, remove the barriers provided.

The opening was needed for light and air. Mr. Woolson might have anticipated that in the ordinary use of the elevator, the plank door would be opened to let in light and air, and that to let in air the lower sash would be lifted or the upper one lowered. But if the tenant should be using the elevator in a manner that would make it obviously unsafe to raise the lower sash, we do not think it reasonable to say that Woolson should have anticipated or was bound to foresee that the lower sash would be raised, especially in view of the fact that the same light and air would

chargeable with negligence. The other part of the charge I call attention to was excepted to specifically on behalf of Woolson. I have already undertaken to point out that it was necessary in order to make Mr. Woolson legally responsible here that he should have been negligent in both respects charged. That is to say, in leaving the jog in the floor of the platform, and also in not providing for the opening at the window, so that things might not fall out; and in one paragraph, at least, of the charge it seems to be stated, indeed it is stated distinctly that if he was negligent in *either* respect, he was legally responsible. I read that part of the charge:

“Next as to the defendant Woolson: In order to entitle the plaintiff to recover of the defendant, Woolson, it is incumbent upon him to show by a preponderance of the evidence, first, that the elevator or the elevator shaft was in a defective or unsafe condition by reason of the opening or depression adjacent to the elevator platform when it was at the fourth floor, not being sufficiently covered or guarded, or by reason of there being no bars or other obstructions across the window, *either* or both.”

Making him responsible on account of negligence in either respect; making him responsible, though the jury may have found that he had exercised due care in providing barriers for the windows so that goods might not fall out; though they might have found that the barriers provided were entirely adequate; that he was not negligent in that respect, yet the court says, if he was negligent in the other respect, he is liable; and that part of the charge we think is erroneous. It must appear not only that Woolson was negligent, but that his act of negligence was the proximate cause, or a proximate cause of the injury. The law does not impute negligence to one for his act resulting in an injury which would not have happened but for the interposition of a new and independent cause which was not to be reasonably anticipated, and when the new and independent cause consists in a voluntary and negligent act of another person, that such negligence is to be anticipated is not ordinarily a reasonable conclusion; for it is usually more reasonable to anticipate ordinary care, at least, in the conduct of sane adults.

ERROR PROCEEDINGS IN CRIMINAL CASES.

Court of Appeals for Lucas County.

EMMET SMITH V. STATE OF OHIO.

Decided, January 19, 1914.

Exceptions in Criminal Proceedings—Time Within Which Bill of Exceptions and Petition in Error May be Filed—Section 13680.

1. The period within which a bill of exceptions must be prepared and filed in a criminal case is the same as that allowed in civil actions.
2. The time limitation for filing a petition in error to reverse a judgment in a civil action has no application to a criminal action.

Byron F. Ritchie, for plaintiff in error.

Charles M. Milroy, Prosecuting Attorney, and *August F. Connolly*, contra.

RICHARDS, J.; KINKADE, J., and CHITTENDEN, J., concur.

Error to common pleas court.

An indictment for robbery was returned against Emmet Smith in the court of common pleas of this county on March 3, 1911. Trial was had at the same term of court resulting in a verdict of guilty as charged in the indictment, on March 13, 1911. He filed a motion for a new trial within three days and that motion was heard and overruled by the court on March 18, 1911, and the defendant sentenced to the Ohio Penitentiary for a period of ten years. A bill of exceptions was prepared in the case setting out all of the evidence and that instrument was filed in the court of common pleas on May 27, 1911, and was signed by the trial judge and returned by him to the clerk of that court on June 10, 1911. A petition in error was filed by the defendant in this court on September 12, 1913, in which ten grounds of error are assigned, nearly all of which relate to errors claimed to have been committed during the trial of the case and which could appear only in the bill of exceptions.

In the hearing of the case in this court counsel by brief and by oral argument have relied almost wholly upon conten-

no provision in the statutes granting the right to file petitions in error in criminal cases, which in any way refers to or adopts the limitation for petitions in error in civil cases, similar to the provisions as to bills of exceptions contained in Section 13680, General Code.

We hold, therefore, that the statutory limitation for filing petitions in error in civil cases has no application to a proceeding in error in a criminal action. *Blackburn v. State*, 22 Ohio St., 581; *Nickel v. State*, 6 C. C., 601.

It follows that we may consider the petition in error and pass upon any claimed errors which appear in the record other than those which appear only in the bill of exceptions. In the argument of the case no such errors were indicated, and a careful examination of the record other than the bill of exceptions, fails to disclose that any exist.

Finding no prejudicial error appearing on the face of the record, the judgment of the court of common pleas will be affirmed.

END OF VOLUME XX.

taken, although denominated for specific performance and relief and averring refusal to permit an audit of books or to submit any statement, is for a money judgment and not appealable. 282.

Failure to file petition—judgment on cross-petition is *res judicata*. 31.

Questions on the pleadings are brought up the same as if the appellate court had original jurisdiction, hence the refusal of the trial court to strike a supplemental pleading from the files is open for decision. 513.

APPEARANCE—

Motion to discharge an attachment for the reason that defendant is not the owner of the property "and the court therefore has no jurisdiction of the subject-matter," refers by the words "subject-matter" not to the merits of the case but to the property and is not an entry of appearance. 210.

ASSESSMENTS—

Where a market house occupies the entire middle length of a street, an assessment of 50 per cent. on the abutting property, leaving the city to pay the other 50 per cent., is not inequitable and will not be enjoined. 566.

ATTACHMENT—

Permitting an attachment of ten per cent. of wages on claims for necessities does not create a favored class of persons, for it relates to a class of cases, and is constitutional. 452.

Necessaries for which ten per cent. of personal earnings is attachable means for the debtor or his family and does not include a claim for groceries furnished on his order to his boarding house keeper, although she is his mother, he being under no obligation to support her. 559.

An attachment on the ground of necessities is not confined to personal earnings. 451.

A garnishee (a foreign corporation) admitting the debt due de-

fendant but showing that it is due in another state can not be ordered to pay in this state. 443.

ATTORNEY AND CLIENT—

Authority to reserve payment implied from other acts. 425.

Client remitting from judgment assigned to attorney. 239.

BANKRUPTCY—

As a appeal bond is conditioned to satisfy a judgment if rendered on appeal, bankruptcy of the debtor will not be allowed to prevent prosecution of the appeal to judgment in order to fix the liability of the sureties, although execution on the judgment would be perpetually withheld. 162.

BANKS—

G. C. 4394, authorizing a city or village treasurer with the consent of his bondsmen to deposit money in a bank without being released from liability is only for a safe keeping and not as an authorized depository, hence the bank receives such money only as a special and not general deposit. 575.

G. C. 12875, that the prior drastic criminal sections shall not make it unlawful for the treasurer of a township, city, etc., to deposit public money in a bank but not releasing the treasurer from liability for any loss thereby does not authorize a deposit except for safe keeping, hence the bank only has the same title as the treasurer and holds the fund as a special deposit and not as a depository under G. C. 3320. 575.

BILL OF LADING—

Transfer of, by consignee. 246.

BILLS AND NOTES—

Verbal condition. 201.

To bind the estate of a deceased indorser notice to his administrator describing the note as payable to decedent and "endorsed by you" will be held good, for considering that he could not indorse as administrator he must have under-

time in Section 10, does not limit his continuance when the commission has not held any examination. 417.

Charges upon which a policeman is tried and discharged by the director of public safety and the civil service commission must be such as to sustain the judgment as in a civil action and if indefinite and trivial or not such as are recognized by the law or the rules of the department the discharge is void, but if any of the charges are sufficient the court can not inquire if they were sustained, for the jurisdiction of the commission is final and not reviewable. 250.

The commission having determined that a police corporal is eligible to examination for promotion and he having obtained such promotion accordingly the commission or its successor is without power to reverse such decision. The commission having reported the corporal as eligible for examination, though he had not been a corporal for two years as required by their rules, will be deemed to have suspended the rule which it had power to do. 366.

CONFLICT OF LAW—

Interest law of other states presumed same as ours. 201.

Where a citizen of Ohio becoming indebted to his wife in this country delivers to her in Italy in payment a conveyance of his interest in property in Ohio the laws of Ohio and not of Italy govern the transaction. 1.

CONSTITUTIONAL LAW—

The section of the former Municipal Code, providing that no fireman serving when the act went into effect should be removed except in accordance with the act, is not an exercise of the appointing power and is constitutional. 478.

Regulating business: bottle law valid. 139.

Comparative negligence statute not applicable to existing causes of action, being a vested right. 236.

Favored class. 452.

CONTRACT—

Covenant not to compete; if business not continued injunction refused but damages granted. 205.

Employee's contract not to compete not enforced if discharge is wrongful. 233.

Prior representations agreed to be annulled. 279.

In case of imperfect performance of a building contract the jury may add to the damages compensation for inconvenience which was a natural and direct result and should have been contemplated as probable; and the jury may determine the amount from the facts without evidence of the value of the inconvenience; and doubted if any such evidence would be competent. 336.

CONVERSION—

What is; selling stored goods without denial of ownership: limitations. 17.

CORPORATIONS—

A sale of treasury stock by the board of directors to one of their number for two per cent. cash and balance in ten annual payments, without effort to sell others and with a cash offer on hand will be set aside as fraud on the corporation and its stockholders. 78.

It is doubtful whether an agreement by a majority stockholder in selling the bulk of his stock to the other stockholders, that they should have control of the corporation, is of any validity to enable the latter to sell treasury stock except *bona fide*. 78.

The rule that a stockholder can not sue for the benefit of the corporation without alleging demand and refusal of the proper officers to act does not apply where the petition shows that such officers were the wrong-doers against whom the action would have to be brought and that the demand would be a vain thing. 67.

A director who is also a majority stockholder having given the corporation an option to pur-

represented value and not the difference between the value of the thing parted with and the thing received. 137.

DEDICATION—

Where a recorded plat which is not signed is adopted in conveyances by reference to a road thereon shown (Linwood road, now Observatory avenue in Cincinnati) and the road is used as a public highway this operates as a dedication. And where the width of the road is not given but scales sixty feet, the sixty foot line may be taken though the fences were within that line. 212.

That a road shown on an unsigned plat is owned and operated by a private turnpike or plank road company does not prevent the plat and deeds operating as a dedication; for a turnpike road can be constructed only by law and when used becomes a public highway. 212.

A common law dedication, as by recognizing a certain part of patented land as a grave yard and its annexation to a city and use as such does not convey a fee. And where the city abandons such use, as by removals of remains, which it may do under the police power, the land reverts to the descendants of the patentee, such abandonment of use not being a sufficient adverse possession to give the city any title. 47.

DEEDS—

Where the granting clause is to F, his heirs and assigns, and the habendum is to him for life with reversion at his death to his children, heirs of his body and their heirs and assigns, and in default of children to his brothers and sisters, the rule in Shelley's case applies and the grantee takes a fee simple. 352.

A restriction in a deed against erecting any house at a less cost than \$3,500, though not violated by moving a barn upon the lot, is violated by converting the barn

into a house of a total value of less than \$3,500 and living in it. A reasonable time to vacate the same as a dwelling will be granted in the injunction order. 295.

A restriction in a deed against the building of sheds, barns or shops includes a garage. 116.

A restriction against any building except an open porch being nearer than twenty-five feet from the street is not violated by the fact that the roof of an open porch is a continuation of the roof of the main building and though the triangle between the porch ceiling and its roof is closed in. 378.

Prohibiting the construction of a shed or barn on any of 800 lots of a subdivision is not waived by failure of the owner of a lot to object to or enjoin the building of garages on fourteen lots and does not estop him to insist on the restriction as to another lot so long as he had neither erected one of the others nor one on his own lot. 116.

DEPOSITARIES OF PUBLIC FUNDS—

See BANKS.

Where certain banks are accepted by county commissioners as county depositories under G. C. 2715, without designating which shall be active and which inactive depositories a bank not located at the county seat and therefore only eligible as an inactive depository will be deemed legally intended as such though not specifically so designated. 575.

Taxes collected in a village branch tax office as authorized by G. C. 2746, may be delivered by the county treasurer directly to a county depository without being first sent to the county treasury, and such taxes are "undivided tax funds" under G. C. 2737 and therefore eligible to deposit in a depository. Hence when such bank fails, the fund can not be deemed a special deposit and entitled to preference. 575.

Whether landlord or tenant is the responsible employer of a negligent elevatorman where a third person was injured. 583.

A young woman who is sent for to begin work at once in a laundry and accepts by donning her working clothes and accompanying the messenger back, is an employee and not a trespasser; and if, under charge of the messenger, he conducts her in through the engine room, where she steps into an uncovered sunken barrel of boiling water, the employer is liable. 314.

Liability for chauffeur's joy ride; motor not a dangerous agency. 182.

The rule that where there is a safe way and an unsafe way of doing a thing an employee chooses the unsafe way at his peril, does not require more than ordinary care in the selection. 34.

Knowledge of the operator of an elevator that a workman making repairs on the cables will be injured if the elevator is moved without warning him, is knowledge of the owner. 34.

An employee of a railroad negligently struck on the nose by the mallet of a fellow-servant while both are replacing old ties with new can not hold the railroad liable; G. C. 6244, taking away the defense of fellow-servant in case of the negligence of a "repairman," refers to repairers of tools and places where work is done. 74.

Where a switchman jumped off the back of an engine which then backed down on and killed him when he should have known it would do so, the fact that the engineer had been on duty over fifteen hours contrary to G. C. 9007, does not make the railroad company liable, as this did not produce the injury. 236.

Comparative negligence statute not applicable to existing causes of action. 236.

Averment of lack of knowledge inserted after verdict. 556.

Where defendant is sued for furnishing his employee with a dangerous horse in his employment causing his death, a verdict for defendant on an answer denying that decedent was an employee will not be reversed on proof of the viciousness of the horse, for the duty owing to a servant is not a duty owing to a mere volunteer. 310.

Where plaintiff sues as an employee who has been furnished with a dangerous agency (a vicious horse) without warning and the answer denies that he was an employee and pleads contributory negligence, a general verdict for defendant is equivalent to a finding that he was not an employee. 310.

A foreman on the track being run down by a switch engine is entitled to put in evidence a rule of the company requiring every employee to use the utmost caution especially in switching, as bearing on a charge of contributory negligence, the court cautioning the jury as to the different degree of care called for by the rule and that applicable to the company. 464.

Where a foreman walking on the track is run down by a switch engine, if the jury find each party negligent, they should under G. C. 9018, determine the comparative degree of negligence, diminishing the damages accordingly if they find for plaintiff. 464.

Whether a workman for an independent contractor in repairing elevator cables was negligent in relying on the promise of the owner's elevator operator to notify him each time the elevator is moved, is a question for the jury. 34.

Where a foreman of track repairs in a railroad yard in returning from another yard walks down the track towards his men and appears to be looking along the track when he was killed by a switch engine backing down on him, it should have been left to

is limited to ascertaining whether the rate fixed is reasonable, but not to fix it. 254.

In fixing the rate for natural gas, elements to be considered are the net profit under a fixed rate, whether such rate will yield a fair return on the investment and considering depreciation and risk. 254.

Twenty cents per 1000 feet for natural gas is not confiscatory where the wells, though somewhat depleted still yield four times the consumption and the company has paid ten per cent. dividends on a rate of only 18 cents and the present rate of other localities on the same field is 18 cents. And where the rate complained of has been in force for three years and the company makes no showing of its operations during that time, the rate will not be declared confiscatory. 254.

After the city council has authorized a public improvement, a modification of the contract may be made by the executive officers under G. C. 4331, though not specifically authorized by council. 47.

The fact that a modification of a contract for improvement found to be desirable and partly necessary after the work is under way will increase the cost does not require the new contract to be advertised and let to the lowest bidder, where this would introduce inextricable confusion, vexatious delays and expensive litigation. 47.

A statute requiring the modification of an existing contract to be made a matter of record is directory only and failure by an oversight to make the record does not annul such action regularly taken by the proper board. 47.

Ordinance not following state law, void. 453.

Where after an appropriation for an improvement and funds provided by sale of bonds a new contract modifying certain terms of the original is not invalid for failure of the auditor to certify

funds on hand, for this is not required where the fund is provided by sale of bonds for the purpose, or as here if the modification does not increase the cost. 47.

Where the mayor having appointed a street commissioner for one year as G. C. 4251 requires him to do but council refuses to confirm, this does not give the mayor the right to make a "temporary appointment" "to prevent a stoppage of public business." (G. C. 4438 does not apply, for it relates only to civil service employees. 399.

Confirmation by a village council is as necessary to the mayor's appointment of a street commissioner to fill a vacancy, as in case of a full term. G. C. 4363 must be so construed in view of the general policy of appointments. 399.

After a fireman has been retired and put upon the pension role the trustees of the firemen's pension fund can not discharge him from the department and reduce his pension for violation of rules before his retirement. 13.

MUTUAL BENEFIT SOCIETY—

A requirement that none but practical Roman Catholics can be or remain members is valid, and marriage to a divorced person whose divorced spouse is still living violates such requirement and justifies expulsion. 291.

A member must exhaust the remedies provided by the laws of the order for the redress of grievance before he can resort to the courts. 291.

If the society has not provided any remedy for a review of its refusal to pay sick benefits nor any tribunal for hearing an appeal therefrom the claimant may resort to the courts. Where the laws of the society merely provide that a member punished for a transgression or for immoral conduct has no right except by appeal to the union this does not provide an appeal from a refusal to pay sick

ticular facts is correctly given in the charge to the jury it is of no importance whether this is called reasonable care instead of highest degree of care. 302.

NEW TRIAL—

In an accident case questions to jurors on their *voir dire* as to whether or not they were connected with an insurance company, being a thinly veiled subterfuge to convey the impression that a liability company was interested, does not safeguard the plaintiff and does prejudice the defendant. 99.

Where the newly-discovered evidence was unknown to counsel but his client could have communicated it to him at any time before trial a new trial will not be granted. 492.

NUISANCE—

Where pending a suit to enjoin the construction of a dry cleaning plant near residences the defendants have changed their plant reducing the smell and fire danger so as not to constitute a nuisance, injunction will be refused, the suit dismissed but at defendants' costs, since the original plan would have created a nuisance. This will not prevent injunction in case the plant turns out to be a nuisance. 522.

OFFICE AND OFFICER—

The chief of a volunteer fire department elected by the city council under an ordinance is an officer within R. S. Section 8 (G. C. 8) and therefore holds until his successor is elected and qualified. 478.

A janitor-engineer of a Cincinnati public school is not an independent contractor but an employee within the classified service (G. C. 486-8) but, if an incumbent when the civil service act was passed, is entitled to hold over subject to a non-competitive examination. 529.

Appointing power; preventing removal is not. 478.

Mandamus if money drawn for the purpose though informally. 529.

PARTIES—

Secretary of State made party if he directed conduct. 190.

PENSION—

Not reducible for prior offenses after being put on pension rolls. 13.

PHOTOGRAPHS—

Pictures or cuts not exact, as illustrations. 34.

PLEADINGS—

Supplemental. 513.

Where two causes of action are virtually the same and a demurrer to the first is properly overruled, sustaining a demurrer to the second, though logically incorrect, is not prejudicial. 537.

Treated as an affidavit if sworn to—see AFFIDAVITS. 151.

POLICE POWER—

Ordinance unreasonably restricting building. 538.

PROSECUTING ATTORNEY—

Injunction by, forbidden under workmen's compensation act. 548.

PUBLIC CONTRACTS—

Modification by executive officers. 47.

Record required of modification is directory only. 47.

Re-letting not necessary of modified contract, when. 47.

Bidding not necessary for school janitor. 529.

An ordinance for the abolition of a grade crossing, which recites that the city will increase the width of the street without additional cost to the railroad, does not embrace more than one subject, for the increase of width will require independent ordinances and the recital here merely outlines the scheme. 548.

The determination as to whether a railroad shall cross another overhead or on grade need not be